INDEX

Supreme Court of the United States

OCTOBER TERM, 1966

No. 252

HARVEY LYLE ENTSMINGER, PETITIONER

vs.

IOWA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

INDEX

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PAGE

[fol. 1]

"IN THE DISTRICT COURT OF IOWA, IN AND FOR POLK COUNTY

* * * *

THE STATE OF IOWA

against

HARVEY LYLE ENTSMINGER, DEFENDANT

INFORMATION FOR UTTERING A FORGED INSTRUMENT
Sworn to Sept. 14, 1964

Comes now Edward R. Fitzgerald, First Assistant County Attorney of Polk County, State of Iowa, and in the name and by authority of the State of Iowa, accuses HARVEY LYLE ENTSMINGER of the crime of UTTERING A FORGED INSTRUMENT, as defined in Section 718.2 of the 1962 Code of Iowa,

Committed as follows:

The said HARVEY LYLE ENTSMINGER on or about the 29th day of May, A. D. 1964, in the County of Polk and State of Iowa, uttered and published as true and genuine a forged instrument in writing purporting to be a bank check, it being in words and figures as follows, to-wit:

"CAPITAL CITY STATE BANK 33-7/713

DES MOINES, IOWA May 29 1964 No.——

PAY TO THE ORDER OF H. P. Entsminger $67.20

Sixty Seven ——— 20/100 DOLLARS

FOR Dry Wall RON WOODS"

On the back of said check is endorsed the following:

"H ENTSMINGER
NORRIS J. FOGUE"

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Iowa.

/s/ Edward R. Fitzgerald
First Assistant
County Attorney.

STATE OF IOWA, Polk County, ss.

I, Edward R. Fitzgerald, being first duly sworn, do depose and say, that I have made full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing information are true, as I verily believe.

/s/ Edward R. Fitzgerald

Subscribed and sworn to by Edward R. Fitzgerald before me, the undersigned this 14 day of Sept., A. D. 1964.

/s/ Beryl Lang, Dep. Clerk."
Notary Public in and for
Polk County, Iowa.

[fol. 2]

IN THE DISTRICT COURT OF POLK COUNTY

"STATE OF IOWA

vs.

HARVEY LYLE ENTSMINGER

SUMMARY OF TESTIMONY

W. E. MAROHN testified

That he is a Detective of the Des Moines Police Department; that the following-described check was received at Morris J. Fogue's, 6804 S.W. 17th Street and returned from the bank marked "Signature Not as on file"; that the check is on the Capital City State Bank, Des Moines, Iowa, dated May 29, 1964, pay to the order of H. P. Entsminger the sum of $67.20, marked For Dry Wall, signed Ron Woods, indorsed on the back H Entsminger and Norris J Fogue; that Harvey Entsminger was arrested in connection with this case and admitted that he had been drinking for some time and had passed several checks in the city; that he was recently released from the Fort Madison penitentiary for a previous check charge; that charges of Uttering a Forged Instrument were filed against Harvey Lyle Entsminger in this case.

BILL J. BOYER testified

That his name is Bill J. Boyer, and he is Assistant Cashier and Head Teller of the Capital City State Bank; that he has before him a check drawn on the Capital City State Bank, Des Moines, Iowa, dated May 29, 1964, pay to the order of H P Entsminger the sum of $67.20, marked For Dry Wall, signed Ron Woods, slip attached marked "Signature not as on file", indorsed H Entsminger and Norris J Fogue; that he has compared the signature on this check to that in their files at the bank, but this is not the authorized signature; that he believes this was one of the first checks to come in; that he was unable to get ahold of the account by telephone, so the check was re-

turned "signature not as on file; that when several more checks came in, he was able to get ahold of him by telephone, and the man came down to the bank; that they checked it out and it definitely was not his signature; that it looks like the bank would have received the above-described check on or about June 3, 1964.

SCOTT E. WRIGHT, JR. testified

That his name is Scott E. Wright, Jr. and he is employed at the Norris DX Service Station located at 1326 Army Post Road; that this station is managed by Morris J. Fogue; that he has before him a check on the Capital City State Bank, Des Moines, Iowa, dated May 29, 1964, pay to the order of H P Entsminger the sum of $67.20, marked "For Dry Wall", signed Ron Woods, slip attached marked, "Signature not as on file", indorsed on the back H Entsminger and Norris J Fogue; that Harvey Lyle Entsminger came into the station and had his tank filled on his car, and he put in a quart or two of oil; that Mr. Entsminger gave him this check, and he gave the balance of the check to Mr. Entsminger in cash; that he would be able to identify this man if he saw him again; that this check was later returned from the bank because of the signature on the check.

[fol. 3] NORRIS J. FOGUE testified

That his name is Norris J. Fogue and he operates a DX service station located at 1326 Army Post Road; that he has before him a check drawn on the Capital City State Bank, Des Moines, Iowa, dated May 29, 1964, pay to the order of H P Entsminger the sum of $67.20, marked For Dry Wall, signed Ron Woods, slip attached marked "Signature not as on file", indorsed on the back H Entsminger and Norris J Fogue; that the second of these is his indorsement on the check; that he then deposited the check in his bank account, and the check was subsequently returned to him in the normal course of business marked "Signature not as on file".

RONALD E. WOODS testified

That his name is Ronald E. Woods and he resides at 1106 West Street; that he is employed at Dean's Phillips 66

station located at 10th and University; that he has before him a check drawn on the Capital City States Bank pay to the order of H P Entsminger the sum of $67.20 dated May 29, 1964, marked For Dry Wall, signed Ron Woods, slip attached marked "Signature not as on file", indorsed on the back H Entsminger and Norris J Fogue; that this is not his signature on the check; that on May 29, 1964, he did not know a Harvey Lyle Entsminger, and he did not have his permission to write his name on this check and no one else had such permission; that they had a checking account in the Capital City State Bank, but after this difficulty they closed the account.

DUANE L. BARTON testified

That he is a special agent of the Iowa Bureau of Criminal Investigation; that he has a check dated May 29, 1964, drawn on the Capital City State Bank, Des Moines, Iowa, made payable to H P Entsminger the sum of $67.20, drawn by Ron Woods, indorsed H Entsminger and Norris J Fogue; that he has examined this particular check and compared it against the handwriting admittedly written by Harvey Entsminger that is in the possession of Lt. Dawson of the Des Moines Police Department and, in his opinion, Harvey Entsminger did author this check, both face and indorsement.

[fol. 3a] C. DAWSON testified

That he is a member of the Des Moines Police Department, Identification Bureau; that he has a check drawn on the Capital City State Bank, Des Moines, Iowa, dated May 29, 1964, pay to the order of H. P. Entsminger in the amount of $67.20 marked for Dry Wall and signed Ron Woods and endorsed on the back H. Entsminger; that Harvey Lyle Entsminger refused to give them a sample of his handwriting when he was processed through the Identification Bureau; that the check charge was filed on him and he had a hearing in Municipal Court; that he had another check in the file and W. E. Marohn filed another charge on him at that time and did bring him down to the booking room again; that during that day, he showed them what he called legal papers that he was

going to file against several people, including the Police Department, Deputy Sheriffs, and the Sheriff and said he wrote them out in his own handwriting; that they asked him the question twice if that was his handwriting and he said it was; that he conferred with the County Attorney's Office and they advised that he would be able to hold this to check as handwriting; that he told him what they were going to do with these papers and he said that was all right, he would write some more the next day; that he examined and compared the face of the check and the endorsement on the check with the known handwriting of Harvey Lyle Entsminger, and in his opinion, he did write the check and the endorsement."

[fol. 4]

* * * *

SUMMARIZATION OF STATEMENT AND INSTRUCTIONS

"STATEMENT

"On the 14th day of September, 1964, the County Attorney of Polk County, Iowa, filed an information against Harvey Lyle Entsminger accusing him of uttering a forged instrument as defined in Section 718.2 of the 1962 Code of Iowa, and charging that Harvey Lyle Entsminger uttered and published as true and genuine a forged instrument purporting to be a bank check.

SUMMARIZATION OF INSTRUCTIONS NOS. 1 THROUGH 5

"To this information the defendant has entered a plea of not guilty, and upon the issues thus joined you are instructed as follows:"

Instruction No. 1, stating that the burden of proving guilt rests upon the State.

Instruction No. 2, stating that the defendant could be convicted only upon evidence given in court, and that the information, arrest, and prosecution were not to be taken as proof or presumption of guilt.

Instruction No. 3, explaining that the State had to overcome the presumption of innocence and to establish guilt beyond a reasonable doubt, and describing in detail what constitutes a reasonable doubt.

Instruction No. 4, defining "burden of proof" and "evidence."

Instruction No. 5, defining the words "wilfully," "unlawfully," and "feloniously."

[fol. 5] INSTRUCTION NO. 6

"A statute of this State provides that if any person utter and publish as true an instrument in writing, to-wit, a bill of exchange, knowing it to be false, with intent to defraud, he shall be punished as in said statute provided. A check is a bill of exchange drawn on a bank payable on demand."

[fol. 6] INSTRUCTION NO. 7

"The burden of proof in this case is upon the State to establish the guilt of the defendant, Harvey Lyle Entsminger, and in order to convict said defendant of the crime of uttering a forged instrument it is necessary that the State establish beyond a reasonable doubt each and all of the following propositions, to-wit:

1. That Harvey Lyle Entsminger did utter and publish as true and genuine the check introduced in evidence as Exhibit A to Norris D.X. Service Station in Polk County, Iowa.

2. That said check was a false and forged check in this that the signature Ron Woods on the face of the check as maker was a forged signature.

3. That at said time of uttering and publishing said check, Exhibit A, the defendant, Harvey Lyle Entsminger, knew said check was false and forged and that the same was uttered and published with intent to defraud.

"If you find that the State has established each and all of the foregoing propositions beyond a reasonable doubt then it will be your duty to find the defendant, Harvey

Lyle Entsminger guilty of the crime of uttering a forged instrument as charged in the information herein. But if you fail to so find as to any one of the above propositions you should find said defendant not guilty."

[fol. 7] INSTRUCTION No. 8

"To utter, within the meaning of the statute, is to deliver or pass to another a false or forged written instrument as true and genuine. A forged check as applied to this case may be defined as a check which purports to have been signed as maker by any certain person, when in fact the same was not so signed by such person but was signed by some person other than the one whose name actually appears on the instrument as maker, and without authority from the person whose name appears thereon as maker.

"As applied to this case, if you find from the evidence that Harvey Lyle Entsminger did in fact deliver or pass the check in question in this case, Exhibit A, knowing the signature thereon, "Ron Woods" was not genuine, and with intent on the part of Harvey Lyle Entsminger to receive money therefor, then you would be justified in finding that said check was uttered and published to the said Norris D.X. Station with intent to defraud. Otherwise not."

[fol. 8]

SUMMARIZATION OF INSTRUCTIONS 9-10-11-12 AND 13

Instruction No. 9, stating that direct proof is not required of intent, and that intent may be inferred from acts as disclosed by the evidence.

Instruction No. 10, cautioning the jury to receive testimony with regard to verbal statements with great caution.

Instruction No. 11, explaining that it was for the jury to determine how much weight should be given to expert testimony, and explaining the factors the jury may consider in weighing the testimony, including whether other evidence establishes facts stated in hypothetical questions.

Instruction No. 12, explaining that the value of opinions as to personal identity depended upon the extent of knowledge of the witness, the opportunity for observation, and the circumstances surrounding the transaction.

Instruction No. 13, explaining the difference between direct evidence and circumstantial evidence, and stating that, in order to convict on circumstantial evidence, the circumstances must produce a moral certainty, and not merely render probable the guilt of the accused.

* * * *

[fol. 9] INSTRUCTION NO. 14

"There has been introduced into evidence in this case, as Exhibits I and J on the part of the State of Iowa, certain handwriting claimed by the State to have been written by the Defendant, Harvey Lyle Entsminger.

"You are instructed that Exhibits I and J were allowed into evidence for the limited purpose of demonstrating the handwriting contained therein and that only the handwriting as such and not the subject matter contained in said Exhibits may be considered as evidence.

"If you find that the handwriting in said Exhibits was done by the Defendant, Harvey Lyle Entsminger, you may give the handwriting such weight as you may determine. If not, you must disregard said Exhibits."

[fol. 10]

SUMMARIZATION OF INSTRUCTIONS NOS. 15 THROUGH 18

Instruction No. 15, stating that the jury, in evaluating the defendant's testimony, might take into consideration the defendant's interest in the outcome of the case, but that all the facts and circumstances in evidence should be taken into consideration in attaching weight to the testimony; and charging the jury to consider evidence of previous conviction of felonies only for the purpose of determining credibility of the witness.

Instruction No. 16, stating that the court did not intend at any time to give any opinion as to the facts

or as to what the verdict should be, and that the jury should disregard all matters extraneous to the evidence at arriving at a verdict.

Instruction No. 17, explaining that the jury could evaluate credibility of witnesses and giving the jury some of the factors to be considered in evaluating credibility.

Instruction No. 18, explaining in general the duty of jurors to ascertain the facts according to the law as charged by the court.

* * * *

[fol. 11] INSTRUCTION No. 19.

"Herewith you will find two forms of verdict.

You will use that form which accords with your finding, sign the same by one of your number as foreman, and return with it into open court.

/s/ Dring D. Needham"
Judge.

[fol. 12]

NOTE RE LETTER FROM PETITIONER TO COURT

The following letter from petitioner to the Court, sent after verdict but before pronouncement of sentence:

"Judge Needham: Your honor I have only one week left before sentence is posted on me, and I would like to file a motion for new *trail.* Would you appoint a lawyer to help me on this matter. Thank you. Harvey L. Entsminger."

* * * *

[fol. 13]

IN THE DISTRICT COURT OF POLK COUNTY

SUBPOENA

Subpoena—State Time (Original) Koch Brothers, Des Moines

STATE OF IOWA)
) ss.
POLK COUNTY)

THE STATE OF IOWA, To Bill J. Boyer, c/o Capital City State Bank, E. 5th & Locust, Des Moines, Iowa; Ronald E. Woods, 1106 West Street, Des Moines, Iowa

You are hereby commanded to appear before the District Court of said County at the Court House in Des Moines, Iowa, at nine o'clock A. M., on the 2nd day of October A. D., 1964 to give evidence in a case between the STATE OF IOWA, plaintiff and Harvey Lyle Entsminger defendant, on the part of said Plaintiff and this you shall in no wise omit, under the penalty of the law.

WITNESS /s/ Michael H. Doyle Clerk of Said Court with the seal thereof hereunto affixed at Des Moines, in said County, this 30th day of September 1964

MICHAEL H. DOYLE, JR., Clerk

By /s/ Beryl Lang Deputy
Co Atty

[fol. 14]

NOTE RE ADDITIONAL SUBPOENAS

A subpoena identical to the above except addressed to: "W. E. Marohn, Des Moines Police Department; Duane L. Barton, Iowa Bureau of Criminal Investigation; C. Dawson, Des Moines Police Department Identification Bureau."

A subpoena identical to the above except addressed to: "Scott E. Wright, Jr., c/o Norris DX Service Station, 1326 Army Post Road, Des Moines, Iowa; Norris J. Fogue c/o Norris DX Service Station, 1326 Army Post Road, Des Moines, Iowa."

* * * *

[fol. 15]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MOTION FOR A NEW TRIAL

COMES NOW, Harvey Lyle Entsminger and moves the Court for a new trial in the above entitled matter for all of the following reasons, to-wit:

1. That the Court erred in admitting evidence over proper and timely objection which was wholly incompetent and inadmissable under the 4th, 5th, and 14th Amendments to the Federal Constitution.

2. That the evidence referred to in Paragraph One was certain writings in the possession of the defendant which were used to prove or establish the hand writing of the defendant and which were removed from the defendant's person or property over his objection and wholly without his consent.

3. That said evidence was not obtained lawfully from the defendant by search and seizure under the statutes in such cases provided and hence was unlawful and incompetent evidence and inadmissable.

4. That said writings were foreign to and in no way connected with the crime and were not obtained in any manner connected with the crime or any search to find things connected with the crime.

[fol. 16] 5. That said defendant never consented to use of said writings in any manner and before they are admissible in evidence the record must show a waiver or consent, and it must be proven by clear and positive testimony and there must be no duress or coercion actual or implied.

6. That the seizure of a mans private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself and in a prosecution for a crime penalty or forfeiture it is equally within the prohibition of the Fifth Amendment and the search and seizure of his private papers is an unreasonable search and seizure within the Fourth Amendment.

7. That there was no competent evidence as to the uttering of the forged instrument.

8. That the evidence was wholly lacking in establishing beyond a reasonable doubt the identity of the signer of the instrument in question.

9. That the verdict is contrary to the evidence and there is no competent evidence to establish beyond a reasonable doubt the guilt of the defendant.

10. That the State failed utterly to prove beyond a reasonable doubt with admissable evidence the Commission of the crime charged in the indictment.

11. That the verdict is the result of passion and prejudice and too much weight was given to the fact that the defendant had been previously convicted of a felony.

[fol. 17] 12. That the defendant was convicted on his record and not on competent or admissable evidence and was therefore twice placed in jeopardy because of a previous crime.

/s/ Harvey Lyle Entsminger
Defendant

/s/ Everett H. Albers
EVERETT ALBERS

/s/ Henry W. Wormley
HENRY W. WORMLEY
Attorneys for said Defendant

[fol. 18]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT

To: HARRY PERKINS, COUNTY ATTORNEY

You are hereby notified that the Defendant herein has appealed to the Supreme Court of Iowa, from the final judgment in this cause and from each and every ruling adverse to the Defendant during the progress and hearing of the said case and that said appeal will come on for hearing in its regular order in said court.

/s/ Henry Wormley
HENRY WORMLEY,
Attorney for Defendant
605 Savings and Loan Building
Des Moines, Iowa 50309
243-1188

ACCEPTANCE OF SERVICE

* * * *

[fol. 19]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRY OF RELEASE ON BOND WITHOUT SURETY—
Filed Aug. 6, 1964

Defendant appears in person & with his attorney—
Deft. released on his own bond without surety.

RAY C. FOUNTAIN, Judge

FILED Aug. 6, 1964.

[fol. 20]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

ORDER APPOINTING COUNSEL AND ENTRY OF PLEA OF NOT GUILTY—Sept. 23, 1964

Defendant being in court personally, states that he has no counsel and is without funds with which to employ counsel. He requests that the Court appoint counsel to represent him. The request is granted and E. H. Albers, is appointed to represent defendant.

Defendant present in Court in person and by his Counsel, says he is informed against by his true name, waives formal arraignment and pleads not guilty.

DRING D. NEEDHAM, Judge

FILED 9-23-64

[fol. 21]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRY OF TRIAL—Oct. 2, 1964

Case called for trial in presence of defendant and his counsel. Jury selected and sworn. One alternate Juror selected and sworn. Information read—plea stated & states evidence briefly stated. Defendant waived statement of defense and evidence at this time. Evidence received. Adjourned at 3:52 P.M.

DRING D. NEEDHAM, Judge

FILED Oct. 2, 1964

[fol. 22]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRY OF IMPANELLING OF JURY—Oct. 2, 1964

NOW on this 2nd day of October, 1964, this cause comes on for trial the State appearing by Jack D. Harvey, Assistant County Attorney, and the defendant appearing in court in person and by Everett Albers, his attorney.

To try the issues joined herein, were called, duly and legally impanelled and sworn according to law, a jury of twelve good and lawful jurors as follows, to-wit: Betty Lou Cumings, Margaret L. Backman, Glenn L. Stitzell, Kenneth O. Wilis, Leland D. Harvey, Theresa J. Taylor, Richard V. LeCroy, Eunice Mott, Jake Mearl Clarke, Donald L. Timmons, Helen G. Hunter, Jeanette Vignovich.

DRING D. NEEDHAM, Judge

FILED Oct. 2n, 1964.

[fol. 23]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

* * * *

[Title Omitted]

VERDICT—Oct. 6, 1964

FORM OF VERDICT NO. 1,

We, the jury, find the defendant, Harvey Lyle Entsminger, guilty of the crime of uttering a forged instrument as charged in the information.

(Signed) DONALD L. TIMMONS, Foreman

FORM OF VERDICT NO. 2.

We, the jury, find the defendant, Harvey Lyle Entsminger, not guilty.

.....
foreman

Filed Oct. 6, 1964

[fol. 24]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRY RE WITHDRAWAL OF EXHIBITS—
Oct. 6, 1964

NOW, on this 6th day of October, 1964, this matter having come before the Court upon the oral application of the County Attorney for the release of Exhibits D, E, F, G, H, and L, which were heretofore received in the evidence on the part of the State of Iowa in the above en-

titled matter, and the Court having examined the records and the file herein and being fully advised in the premises finds that the Jury has returned a verdict of guilty herein and the Exhibits D, E, F, G, H, and L, should be released to the County County of Polk County.

IT IS HEREBY ORDERED that the State's Exhibits D, E, F, G, H, and L, heretofore received in the evidence in this matter be and the same are hereby released to the County Attorney of Polk County and he is directed to take proper safeguard to insure that they will be available to this Court in their present form in any future proceedings which may arise hereunder.

DRING D. NEEDHAM, Judge

FILED Oct. 6, 1964.

[fol. 25]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRIES OF TRIAL

10-5-64 Trial proceeded in presence of defendant & his counsel.—State rested. Record made. Defense evidence received. Defence rested, no rebuttal evidence. Record made. Adjourned. Instructions submitted to counsel.

10-6-64 Instructions in final form submitted to counsel. Court convened in presence of defendant & his counsel. Arguments completed. Record made. Instructions read to jury. Jury retired. Alternate jurors discharged. Case submitted at 11:23 A.M.

10-6-64 At 1:25 P.M. the jury returned a verdict of guilty as charged. Time for pronouncement of sentence fixed for 9:00 A.M. on October 16, 1964.

DRING D. NEEDHAM, Judge

FILED 10-6-64

[fol. 26]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRY RE APPOINTMENT OF COUNSEL—
Oct. 9, 1964

Defendant in Court personally and requests appointment of counsel to file motion for new trial. The Court will endeavor to obtain counsel who will willingly accept appointment, and defendant will be returned to Court at time appointment is made.

DRING D. NEEDHAM, Judge

FILED Oct. 9, 1964

[fol. 27]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ORDER APPOINTING COUNSEL—Oct. 16, 1964

Defendant in Court personally and by his Counsel and Mr. Henry Wormley is appointed to represent defendant. At defendant's request after short conference with Mr. Wormley that Mr. Albers be retained. At Counsel's request time for the pronouncement of sentence and filing motions is set for 9:00 A.M. on October 23, 1964.

DRING D. NEEDHAM, Judge

FILED Oct. 16, 1964

[fol. 28]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

MINUTE ENTRY OVERRULING MOTION FOR NEW TRIAL, SENTENCE, AND APPOINTMENT OF COUNSEL—Oct. 23, 1964

Defendant & counsel in Court personally. Motion for new trial filed and presented to Court. Overruled. Sentence as per written entry filed. At request of defendant, Henry Wormley appointed to prosecute appeal with transcript provided. Defendant requested to remain in Polk County Jail until on or about October 30, 1964 as that physician services be completed on October 28, 1964.

DRING D. NEEDHAM, Judge

FILED Oct. 23, 1964.

[fol. 29]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

[Title Omitted]

SENTENCE—Oct. 23, 1964

NOW, on this 23rd day of October, 1964, the defendant, Harvey Lyle Entsminger, appears in open court in person and with his attorney, Henry Wormley.

The Court finds that on the 6th day of October, 1964, a jury returned a verdict finding the defendant, Harvey Lyle Entsminger, guilty of the crime of Uttering A Forged Instrument, as defined in Section 718.2 of the Code of Iowa 1962, and at that time sentence was set for the 16th day of October, 1964. The Court further finds that on the 16th day of October, 1964, the defendant and his attorney were present in Court and request a defer-

ment of sentence until 9:00 A.M., the 23rd day of October, 1964, which was granted.

This being the date and hour set for sentencing, the Court now proceeds to pronounce sentence.

IT IS THE JUDGMENT OF THE COURT that the defendant, Harvey Lyle Entsminger, be imprisoned in the State Penitentiary at Fort Madison, Iowa, for a term of not more than ten (10) years, as provided for in Section 718.2 of the Code of Iowa 1962. Cost of this action is assessed against the defendant.

Bond on appeal is fixed at $10,000.00.

To all of which defendant excepts.

DRING D. NEEDHAM, JUDGE

FILED Oct. 23, 1964

[fol. 30]

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

CLERK'S CERTIFICATE

STATE OF IOWA
POLK COUNTY, SS:

CLERK'S CERTIFICATE

I, Michael H. Doyle, Jr., Clerk of the District Court, within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and complete copy of COUNTY ATTORNEY INFORMATION, MINUTES OF EVIDENCE, BAILIFF'S OATH, STATEMENT AND INSTRUCTIONS, LETTER, 3 SUBPOENAS, MOTION FOR A NEW TRIAL, LETTER, AND NOTICE OF APPEAL, AND 10 ORDERS & JUDGMENT ENTRY in the case of STATE OF IOWA, VS. HARVEY LYLE ENTSMINGER, BEING CRIMINAL NO. 51568, as full, true, correct and complete, as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of December, 1964.

/s/ Michael H. Doyle, Jr.
Clerk of Said Court.

[fol. 31]

IN THE SUPREME COURT OF IOWA

Note re Letter Accompanying Motion for Bill of Particulars

The following letter and accompanying "Motion for a Bill of Particulars" was filed by petitioner in the Supreme Court of Iowa on January 13, 1965:

> "To Whom It May Concern: Enclosed you will find *two* copys of a Motion for a Bill of particulars the courts copy as marked, and the attorney General's copy, it is requested this be brought to the courts attention immediat*ley* so as to enable me to file an appeal from the court des*iey*ing counsel, if I am not allowed per*mm*ission to raise a point of Law in this matter without taking an appeal or if the attorney General will not give an opinion on this matter. Your ac*ck*knowledgement is requested. I thank you for your time and consideration. Harvey Entsminger."

[fol. 32]

IN THE SUPREME COURT OF IOWA

Motion for a Bill of Particulars

"Comes now your petitioner herein and respectfully represents and states that he is an inmate of the Iowa State Penitentiary, under Register number 28918;

STATEMENT OF FACTS

That petitioner has been denied the advise of Counsel in a Habeas Corpus proceeding, "wherein" the court granted

a petition for Writ of Habeas Corpus and hearing was held in court on said proceeding.

Where a hearing is granted on a petition for Writ of Habeas Corpus to deney a poor person the advice of counsel, is denying him "due process of Law".

That Habeas Corpus is a civil action and petitioner should be allowed to raise a point of Law without taking an appeal from the Court denying counsel.

Wherefore, petitioner ask for an immediate order allowing petitioner to file arguement in the Supreme Court, to merely determine as to *weather* or not it is due process of Law to refuse Counsel to a poor person when a hearing has been granted on a Habeas Corpus.

That if petitioners request to file arguement to raise a point of Law is refused by this Court, the Attorney General, should be obligated to give a ruling as to *weather* a poor person is entitled to counsel when a Habeas Corpus proceeding is granted.

That petitioner has this day caused *a*copy of the above and foregoing Motion to be mailed to the Clerk of the [fol. 33] Supreme Court and Attorney General of Iowa.

That petitioner is a poor person and cannot properly prosecute this action unless granted per*mm*ission to proceed in Forma Pauperis:

Respectfully Submitted

signed HARVEY ENTSMINGER"

Subscribed and sworn to before me at my office at Fort Madison, Iowa, this ——— day of January, 1965.
(s) RALPH D. MOEHM Notary Public in and for Lee County, Iowa. My commission expires July 4, 1966."

* * * *

[fol. 34]

IN THE SUPREME COURT OF THE STATE OF IOWA

* * * *

HARVEY ENTSMINGER, PETITIONER

vs.

ATTORNEY GENERAL, STATE OF IOWA, RESPONDENT

ORDER DENYING MOTION FOR A BILL OF PARTICULARS
January 15, 1965

This paper has been duly considered by the court and the application is hereby denied.

THE SUPREME COURT OF IOWA

(s) T. G. GARFIELD
Chief Justice

* * * *

[fol. 35]

IN THE SUPREME COURT OF THE STATE OF IOWA

[Title Omitted]

NOTICE OF INTENTION TO FILE PRINTED ABSTRACT OF RECORD

To: LAWRENCE SCALISE, ATTORNEY GENERAL

You are hereby advised that the Defendant desires to submit the above entitled case upon a printed abstract of record and brief and argument.

Dated at Des Moines, Iowa, this 8th day of March, 1965.

/s/ Henry Wormley
HENRY WORMLEY
Attorney for Appellant
605 Savings and Loan Building
Des Moines, Iowa 50309
243-1188

ACCEPTANCE OF SERVICE

The undersigned hereby accepts service of the above and foregoing Notice and acknowledges receipt of a copy thereof.

ATTORNEY GENERAL

By /s/ L. F. Scalise
Attorney General

[fol. 36]

IN THE SUPREME COURT OF IOWA

[Title Omitted]

ORDER REGARDING SUBMISSION OF APPEAL—
March 11, 1965

Submission of the appeal in the above entitled case on clerk's transcript is hereby set aside on the court's own motion and IT IS ORDERED that the appeal be submitted on printed abstract, briefs and arguments pursuant to notice by counsel for appellant filed with the clerk of this court on March 8, 1965.

However, this order is without prejudice to right of the attorney general, if so advised, to move to dismiss the appeal for failure to file the abstract of record within the time provided by Court Rule 16, page 2716, Iowa Code 1962.

DONE this 11th day of March, 1965.

THE SUPREME COURT OF IOWA

/s/ T. G. Garfield
Chief Justice

[fol. 37]

IN THE SUPREME COURT OF THE STATE OF IOWA

[Title Omitted]

PETITION FOR WRIT OF CERTIORARI

Comes now Harvey L. Entsminger, Plaintiff herein and presents this, his petition for Writ of Certiorari directed to the District Court of Iowa in ans for Polk County at Des Moines, 19, Iowa, and for cause States whereas:

1) Plaintiff was arrested by City official's at Des Moines, Iowa, on or about June 12, 1964, on an alleged charge of Forgery. (no warrant issued for Plaintiff's arrest).

2) On or about the 13, day of June, 1964, Plaintiff was charged in the Municipal court at Des Moines, Iowa, with the aforesaid charge of Forgery.

3) On or about the 28, day of June, 1964, aforesaid charge of Forgery was dismissed in the Municipal Court at Des Moines, Iowa, on the grounds that the State failed to prove Plaintiff had committed a Forgery.

4) On or about the same 28, day of June, 1964, Plaintiff' was charged with a crime of uttering an Forgered Instrument.

5) In the first part of Aug. 1964, Plaintiff was Bound over to the District Court On aforesaid charge of uttering a forgered Instrument.

6) On the 21, day of Sept, 1964, Plaintiff was arrested at 906 Randolph, st. in Des Moines, Iowa. and informed by Mr. Marohn, the arresting officer that Plaintiff was wanted down town.

7) Plaintiff was not informed that the he had been indicted on specific charge of uttering an forgered Instrument until Plaintiff had arrived at the Jail with the arresting officer, Mr. Marohn.

8) Mr. Marohn, the arresting offericer testified on record that he did not addentifie himself at the time of arrest and that he didnot have a warrant in his possesion for the arrest of Plaintiff.

9) On Oct, 6, 7, 8, Mr. Albert, an attorney, at law represented Plaintiff at his jury trial in the District Court of Iowa in and for Polk County at Des Moines, Iowa.

10)b During aforesaid dates Mr. Albert, Plaintiff's [fol. 38] Court appointed attorney objected to the state using Plaintiff's private paper's on grounds of illegaj search and seizure.

11) On the same 6, 7, 8, days of Oct, 1964, during Plaintiff's jury trial Mr. Albert, Plaintiff's Court appointed atorney didnot object to any of the states questioning of witnesses.

12) On or about the 16, day of Oct, 1964, Plaintiff requested that mr. Albert, Plaintiff's attorney, be dismissed and that Plaintiff be appointed a new attorney to assist in the filing of a motion for new trial.

13) On or about the 23, day of Oct, 1964, Mr. Wormley, a Court appointed attorney filed a motion for new trial in Plaintiff behalf.

14) On or about the 23, day of Oct, 1964, the District Court of Iowa in and for Polk County at Des Moines, Iowa denied Plaintiff's motion for new trial.

15) On the same 23, day of Oct, 1964, Plaintiff requested that his case be appealed to the Iowa Supreme Court and the Court appointed Mr. Wormley, to file appeal in Plaintiff's behalf, to a Complete conclusion with the presentation of records with Brief and arguement in Plaintiff behajf.

16) On the 9, day of March, 1965, Mr. Wormley, Informed Plaintiff when he had completed the record and brief and arguement such would be forwarded to Plaintiff. (see exhibit (one)

17) On the 1, day of Sept. 1965, Mr. Wormley, Informed Plaintiff there would be nothing fijed in Plaintiff's behalf except the record of the case. see: (exhibit (two)

18) That Plaintiff had ineffective assistance of Counsel at his jury trial.

19) That the District Court of Iowa in and for Polk County at Des Moine Iowa acted illegally and in disregards to mandates of the United States Supreme Court by admitting Plaintiff's private papers into evidence.

20) That plaintiff has ineffective assistance of counsel on the one appeal Plaintiff has as of a right.

Wherefore, Plaintiff requests this court to issue a Writ of Certiorari directed to the District Court of Iowa in and for Polk County at Des Moines, Iowa, commanding such court to trahsmit the certified records in the case State of Iowa v. Harvey L. Entsminger, case No. 51568 criminal, to the clerk of the Iowa Supreme Court forthwith, that this court may review the records and determine therefrom wherther or nor Plaintiff in being denied due process of law or has been denied due process of lawa or equal protection of the laws under the provision of the 14, amendment of the constitution of the United States, sec, 1., thereof.

Respectfully Submitted

/s/ Harvey Lyle Entsminger

[fol. 39]

State of Iowa)
County of Lee) ss.

The foregoing Petition for Writ of Certiorari was subscribed and sworn to before mw this 8th day of Oct, 1965, in my office at Fort madison, Iowa, by the Plaintiff Harvey L. Entsminger.

/s/ Ralph D. Moehm
Notary Public in and for Lee County,
Fort Madison, Ia.
My Commission Expires: July, 1966.

[fol. 40] EXHIBIT "1" TO PETITION

Law Office
Henry Wormley
605 Savings and Loan Building
Des Moines, 9, Iowa

March 9, 1965

Telephone
Office C H 3 1188
Home BL 5 5177

Mr. Harvey Entsminger
No. 28918
Box 316
Fort Madison, Iowa

Dear Sir:

This will achknowledge your letter of March 2, 1965, in which you have set forth a multitude of ramblings which have no foundation, do not make good sense, and do not relate to the point where they are entitled to the dignity of an answer; hence, I ignore the same with the above passing remarks.

Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the record.

I am nor unmindful of the time that pasts and the rules of the Supreme Court. As to how I present this case and what I put in the Brief and arguement will be matters that I will pass upon accordingly to my best Judment.

As I told you before, you should desist from filing silly petitions that get you nowhere. however, if it will give you any confort, file any that you want to. When the papers have been prepared, they will be forwarded and I do not have the time to write you as to every move that I make in this case.

The records, When completed, Will show what has been taken care of.

Very Truely Yours,

Signed: HENRY WORMLEY.

HW:mt

[fol. 41]

EXHIBIT "2" TO PETITION

Law Office
Henry Wormley
605 savings and loan Building
Des Moines 9, Iowa

Mr. Harvey Entsminger
No. 29918
Box 316
Fort Madison, Iowa

Dear Mr. Entsminger,

This will acknowledge your letter of recent date. I have received the correspondence from Judge Garfield and as you were informed by him, you would have to bring any habeas corpus proceeding in Lee County and I will not conduct the matter for you.

A habeas corpus cannot take the place of an appeal and is not for the purpose of retrying your case. I am the third lawyer who tried to do something for you and you are unhappy with all lawyers no matter who they are. This is the third time you have been confined and you apparently want to get out. I don't blame you for that, but would suggest that when you do, just conduct yourself properly and you will remain oj the outside.

The printed abstract reveals that you admitted to the detective that you had been drinking and wrote several checks. You also voluntarily signed a signature card and consented to the detective taking your papers. This is not what you told me but of course, it os still the record.

I am of the opinion that there is evidence from which a jury could find you guilty. In addition to that, you voluntarily took the witness stand and so we have no complaint in that area.

The Supreme Court under the law examines the record without regard to technical errows or defects and gives such judgement on the record as the law demands. These gentlemen are better versed in the law than I am and will, I am sure, give you a fair decision. Of course, if

they rule against you, they will be like myself—on your bad list.

I told you before that you better make a good record in the Fort so you can get your good time. You can received a lot of advice down there and as I told you, it is worthless. If your advisers are so wise, why are they down there%

You keep referring to conflicts you have had with me which of course is untrue. There are none and you imagine this with all lawyers. Your case will be tried on the record and not on any personal feelings of anyone. Cases are tried on the evidence presented in court at the trial and your record in the case was made before I ever got into it. I am sure the Supreme Court is not interested in any filings you may desire to make as they have nothing to do with your case, except on appeal.

If it will make you happy, go ahead and file a habeas corpus proceedings in the Lee County Court. It won't do you any good but maybe you will get some satisfaction out of it. I trust this answers your inquiry.

Very truly yours,

HENRY WORMLEY

HW. mt

[fol. 42]

IN THE SUPREME COURT OF THE STATE OF IOWA

[Title Omitted]

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—
Oct. 18, 1965

Petition considerd and denied on the ground it is not filed within the time provided by Rule 319, Rules of Civil Procedure.

THE SUPREME COURT OF IOWA

(s) T. G. GARFIELD, Chief Justice

* * * *

[fol. 43]

IN THE SUPREME COURT OF IOWA
SEPTEMBER TERM 1965

156
51671

* * * *

STATE OF IOWA, APPELLEE

v.

HARVEY LYLE ENTSMINGER, APPELLANT

Appeal from Polk District Court—Dring D. Needham, Judge.

Henry Wormley, of Des Moines, for appellant.

Lawrence F. Scalise, Attorney General, and Don R. Bennett, Assistant Attorney General, for appellee.

PER CURIAM—October 10, 1965

Defendant was charged by county attorney's information with the crime of uttering a forged instrument as defined in section 718.2, Code 1962. He pleaded not guilty, was tried before court and jury, found guilty and was sentenced to an indeterminate term not to exceed ten years in the men's penitentiary at Fort Madison. Defendant's appeal comes to us upon a clerk's transcript which includes the trial court's instructions to the jury. Our study of the record before us discloses no error. The judgment is—Affirmed.

[fol. 44]

NOTE RE FILING OF TRIAL TRANSCRIPT AND TRANSCRIPT OF SUBSEQUENT PROCEEDINGS

Petitioner is depositing with the Clerk of the United States Supreme Court a transcript of the trial (Exhibit A) and a transcript of a subsequent hearing (Exhibit

B). Although these documents were not before the Supreme Court of Iowa at the time it affirmed Petitioner's conviction, Petitioner feels they should be available for the Court's inspection because they are essential to raise accurately Petitioner's search and seizure claim, arising under the United States Constitution, and necessarily passed upon by the Supreme Court of Iowa, and because they are essential to show the activities of record of the trial court, of counsel, and of Petitioner in regard to the appealing of Petitioner's conviction to the Supreme Court of Iowa.

[fol. 45]

IN THE SUPREME COURT OF IOWA

* * * *

CERTIFICATE

ENTSMINGER, PETITIONER,

vs.

THE STATE OF IOWA, RESPONDENT.

CERTIFICATE TO RECORD

I, HELEN M. LYMAN, Clerk of the Supreme Court of the State of Iowa, certify that this Record, in parts I through VIII, accurately sets forth or summarizes all documents and papers filed in the Supreme Court of the State of Iowa in and relating to Cause No. 9-51671, State v. Harvey Lyle Entsminger, and that the document referred to in Part IX of this Record, nor any abstract or summary thereof, has ever been filed in the Supreme Court of the State of Iowa.

/s/ HELEN M. LYMAN
HELEN M. LYMAN, Clerk
Supreme Court of the State of Iowa
Des Moines, Iowa

[SEAL]

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 1012 Misc., October Term, 1965

HARVEY LYLE ENTSMINGER, PETITIONER,

v.

IOWA

On petition for writ of Certiorari to the Supreme Court of the State of Iowa.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 20, 1966

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1434, placed on the summary calendar, and set for oral argument immediately following No. 1181.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 235618 327

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 252

HARVEY LYLE ENTSMINGER,

Petitioner,

vs.

IOWA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF OF PETITIONER

DAVID W. BELIN
300 Home Federal Building
Des Moines, Iowa 50309
Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 252

HARVEY LYLE ENTSMINGER,

Petitioner,

VS.

IOWA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF OF PETITIONER

The opinion delivered in the court below is entitled *State of Iowa* v. *Entsminger,* and is reported at 137 N.W.2d 381 (1965).

Statement of Jurisdiction

This United States Supreme Court granted petitioner's petition for writ of certiorari, and this Court has jurisdiction by authority of 28 U.S.C. 1257(3) because petitioner specially sets up and claims a right under the Constitution of the United States.

Included in the issues in this case, are a search and seizure question and a self-incrimination question involving the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. Although the Supreme Court of Iowa when it affirmed petitioner's conviction did not have before it a transcript, abstract or summary of the trial record or any brief or argument, it necessarily passed upon these issues which were presented to the trial court in a motion for new trial; this motion was included in the "Clerk's Transcript", which was before the Iowa Supreme Court at the time it affirmed petitioner's conviction.

That the Supreme Court of Iowa, in passing on these issues, made no reference to them in its opinion does not preclude this Court from taking jurisdiction to consider the questions. *Toledo, St. Louis and Western Railroad Company* v. *Slavin,* 236 U.S. 454 (1915). If this Court finds unconstitutional the appellate procedure by which petitioner's conviction was affirmed, it may decide a federal question which was not, because of an unconstitutional or inadequate state procedure, effectively considered by the state court. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

The case presently before the Court must be distinguished from cases in which a state had denied completely to an indigent his right to appeal. In such cases, e.g. *Griffin* v. *Illinois,* 351 U.S. 12 (1956), this Court may not have reached substantive federal questions because the state appellate court had never purported to decide any questions involved in the appeal, but instead for some reason denied altogether the opportunity to appeal. In the present case, the Supreme Court of Iowa did purport to decide all questions presented to it by the "Clerk's Transcript", and, purporting to grant petitioner an appeal, affirmed his conviction.

Of course, as shown in Divisions I and II of the petitioner's brief, the procedure by which the Iowa Supreme Court appeal was allowed and was decided violated the rights of the petitioner under the equal protection clause of the Fourteenth Amendment.

Therefore, this United States Supreme Court has jurisdiction.

Constitutional Provisions, Statutes and Iowa Supreme Court Rules

This case involves the following constitutional provisions, statutes, and Iowa Supreme Court Rules:

CONSTITUTION OF THE UNITED STATES, AMENDMENT 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 14, SECTION 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF IOWA, ARTICLE I, SEC. 8:

"Personal security—searches and seizures.

Sec. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."

CONSTITUTION OF THE STATE OF IOWA, ARTICLE I, SEC. 9:

"Right of trial by jury—due process of law.

Sec. 9. The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law."

CONSTITUTION OF THE STATE OF IOWA, ARTICLE I, SEC. 10:

"Rights of persons accused. Sec. 10. In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel."

28 U.S.C. 1257(3):

"State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 U.S.C. 1915 (a):

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

CODE OF IOWA, 1962, SECTION 718.2:

"*Uttering forged instrument.* If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in section 718.1, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be imprisoned in the penitentiary not more than ten years, or imprisoned in the county jail not exceeding one year, or fined not exceeding one thousand dollars."

CODE OF IOWA, 1962, SECTION 793.1:

"*Office of appeal—who may appeal.* The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case is by appeal. Either the defendant or state may appeal."

CODE OF IOWA, 1962, SECTION 793.2:

"*Time of taking—from final judgment only.* An appeal can only be taken from the final judgment, and within sixty days thereafter."

CODE OF IOWA, 1962, SECTION 793.6:

"*Duty of clerk when appeal is taken.* When an appeal is taken, the clerk of the court in which the judgment was rendered shall:

1. Forthwith prepare and transmit to the attorney general a certified copy of the notice of appeal, together with the date of the service and filing thereof.

2. Promptly prepare and transmit to the clerk of the supreme court a transcript of all record entries in the cause, together with copies of all papers in the case on file in his office, except those returned by the examining magistrate on the preliminary examination, all duly certified under the seal of his court."

CODE OF IOWA, 1962, SECTION 793.17:

"*Rules of procedure.* The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases."

CODE OF IOWA, 1962, SECTION 793.18:

"*Decision of supreme court.* If the appeal is taken by the defendant, the supreme court must examine the

record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it."

IOWA SUPREME COURT RULE 15, CODE OF IOWA, VOL. II (PAGES 2715-16):

"When an appeal is taken in a criminal case and the clerk's transcript of the record, required by section 793.6 of the Code, is filed with the clerk of this court, the cause shall be assigned for submission on such transcript, but the date set for such submission shall be not less than ninety days after the date the appeal was perfected as shown by such transcript."

IOWA SUPREME COURT RULE 16, CODE OF IOWA, VOL. II (PAGE 2716):

"If a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall serve on the attorney general and file with the clerk of this court a notice to that effect, before the day set for the submission of the cause under the provisions of Rule 15. In that event, the appellant shall file the printed abstract of the record with the clerk of this court and serve a copy upon the attorney general within ninety days following the service and filing of the notice of appeal, unless, within such ninety days, additional time be granted by a judge of this court after notice and an

opportunity to be heard have been given to the attorney general, and the cause shall be reassigned for submission on a date at least ninety days subsequent to the filing of the printed abstract of the record. Appellant shall serve his brief and argument on the attorney general and file it with the clerk of this court within forty-five days after filing the abstract. The state shall have thirty days after the filing of appellant's brief within which to deny the abstract, serve and file amendment thereto and brief and argument. Appellant shall serve and file his reply brief within fifteen days after the state's brief is filed. A denial by the appellant of the state's additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record."

Questions Presented for Review

1. Where Iowa Law provides for appeal as a matter of right, is there a violation of the constitutional rights of an indigent under the Fourteenth Amendment to the United States Constitution where a State appellate procedure (1) gives to appointed counsel for an indigent accused felon unreviewable discretion to decline, without his client's consent, to submit on appeal a transcript, abstract or summary of the trial record or briefs or arguments in support of the appeal, and (2) in case of such inaction by counsel, permits the appellate court to affirm an indigent's conviction solely on the basis of a collection of miscellaneous papers known as a "clerk's transcript", which does not include a transcript, abstract, or summary of the trial record or a brief or argument in connection therewith?

2. Where Iowa Law provides for appeal as a matter of right and where petitioner, an indigent, requested court appointment of counsel to prosecute an appeal from a trial court felony conviction, and where the lawyer appointed by the court did nothing to prepare and file a transcript, abstract or summary of the trial record or brief or argument on appeal, was the petitioner in this case denied the effective assistance of counsel on his appeal in violation of the Sixth Amendment or the Fourteenth Amendment to the United States Constitution?

3. Where the private correspondence of an accused is removed from his possession and placed in a safe at a jail at the time of his initial booking, and where these personal papers are removed from the safe by the State, without the consent of the defendant and without warrant, for evidentiary purposes of handwriting comparison in a prosecution for uttering a forged instrument, is there a violation of the Fourth, Fifth or Fourteenth Amendments to the United States Constitution, or Article I, Sections Eight, Nine, or Ten of the Constitution of the State of Iowa?

Statement of the Case

The petitioner, an indigent, was convicted in Polk County, Iowa, district court of the crime of uttering a forged instrument and was sentenced for a term of ten years in the state penitentiary where he is now incarcerated (R. 17, 20-21). During the trial there was lengthy testimony by the prosecution's purported handwriting experts, which in large part was based on comparing the handwriting on the instruments involved with the handwriting on two handwritten letters which were removed without petitioner's

consent from a safe at the Des Moines City Jail where his belongings were placed for safekeeping purposes at the time of his initial arrest.

After his conviction petitioner requested that a new counsel be appointed to prosecute an appeal to the Iowa Supreme Court, and this request was granted (R. 20). The newly appointed counsel filed a "Notice of Intention to File Printed Abstract of Record" on March 8, 1965, in which he advised the Attorney General of Iowa and the Iowa Supreme Court that "the defendant desires to submit the above entitled case upon a printed abstract of record and brief and argument" (R. 25).

Thereafter, court appointed counsel did not file either a printed abstract of record or a brief and argument. Accordingly, pursuant to Section 793.6 of the Code of Iowa, 1962, and Iowa Supreme Court Rule 15, the case was submitted before the Iowa Supreme Court on a "clerk's transcript", which does not include a transcript, abstract or summary of the trial record or a brief or argument.

The Iowa Supreme Court on or about October 19, 1965, affirmed the conviction of the defendant (R. 33). Petitioner's petition for a writ of certiorari was granted by this United States Supreme Court.

Statement of Facts

Petitioner Harvey Lyle Entsminger was arrested without a warrant on June 12, 1964, for a traffic violation in Des Moines, Iowa. At the time of petitioner's arrest, the Des Moines Police Department was looking for him because of a bad check which they believed he had passed. As was then customary, petitioner at the time of his booking at

the police station was asked to leave his personal effects with the jailer for safe-keeping. These effects included two letters handwritten by petitioner, which were placed by the jailer in an envelope and locked in a safe-type cabinet in the Des Moines City Jail.

On June 29, 1964, Lt. Carroll Dawson of the Identification Bureau of the Des Moines Police Department came to the jail to speak to petitioner. Lt. Dawson asked petitioner for a sample of petitioner's handwriting. Petitioner refused this request. However, when Dawson requested petitioner's fingerprints, petitioner acceded and also, pursuant to the policeman's demand, signed the fingerprint card.

Police Lieutenant Dawson had been present when the petitioner had been booked and consequently Lt. Dawson was aware that there were two handwritten letters of petitioner in the jail safe. Lt. Dawson testified that without petitioner's knowledge or consent Lt. Dawson obtained from the city jailer the keys to the safe and opened the safe and removed the two personal letters of the petitioner (see Exhibit A, pages 47-49). These two letters formed a vital link in the chain of evidence introduced against the petitioner and were the subject of lengthy testimony by each of the prosecution's handwriting experts. Objection by the court appointed trial counsel was made to the introduction of these two letters as having been unconstitutionally obtained (Exhibit A, page 49).

The petitioner was found guilty by a Polk County jury on October 6, 1964 (R. 18). On October 9, petitioner requested appointment of new counsel to file a motion for new trial and on October 16, the court appointed Henry

Wormley of the Des Moines, Iowa Bar to represent the petitioner (R. 19).

On October 23, Attorney Wormley, together with the trial court appointed counsel, Everett H. Albers, filed a motion for new trial. A major part of the motion and of the argument in support thereof concerned the alleged unconstitutional seizure and use of petitioner's two letters taken without his consent from the jail safe (see Exhibit B). The motion for new trial was overruled on October 23, and petitioner was sentenced for a term of not more than ten years in the Iowa State Penitentiary at Fort Madison (R. 20-21).

Also, on October 23, Attorney Henry Wormley was appointed to prosecute the appeal, with the county to provide a full transcript of the evidence of the trial (R. 20).

On December 3, 1964, the Clerk of Polk County District Court filed what is known as the "clerk's transcript", pursuant to Section 793.6 of the Code of Iowa. This is not the transcript of the evidence, Exhibit A, but rather contained the following as shown by the clerk's certificate:

> "I, Michael H. Doyle, Jr., Clerk of the District Court, within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and complete copy of the County Attorney Information, Minutes of Evidence (of the Grand Jury), Bailiff's Oath, Statement and Instructions, Letter, 3 Subpoenas, Motion for New Trial, Letter, and Notice of Appeal, and 10 Orders & Judgment Entry in the case of State of Iowa vs. Harvey Lyle Entsminger, Being Criminal No. 51568,

as full, true, correct and complete, as the same remains of record in my office" (R. p. 21).

The complete Clerk's transcript is shown at R. pp. 1-20.

On March 8, 1965, court appointed Attorney Henry Wormley filed at the Iowa Supreme Court a "Notice of Intention to File Printed Abstract of Record" directed to the Attorney General of Iowa, and stating:

> "You are hereby advised that the Defendant desires to submit the above entitled case upon a printed abstract of record and brief and argument" (R. p. 25).

On March 9, 1965, Attorney Wormley wrote petitioner that:

> "Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the record" (R. p. 30).

Attorney Wormley did not file any printed abstract or summary of the record nor did he file any brief and argument. Accordingly, under Iowa Supreme Court Rule 15, the case was submitted on the clerk's transcript only and the conviction was affirmed on October 19, 1965, with the following per curiam opinion:

> "Defendant was charged by county attorney's information with the crime of uttering a forged instrument as defined in Section 718.2, Code 1962. He pleaded not guilty, was tried before court and jury, found guilty and was sentenced to an indeterminate term not to exceed ten years in the men's penitentiary at Fort Madison. Defendant's appeal comes to us upon a clerk's transcript which includes the trial court's instructions

to the jury. Our study of the record before us discloses no error. The judgment is—Affirmed" (R. 33).

An analysis of all of the criminal appeals taken to the Iowa Supreme Court over the past 15 years discloses no case where an appeal taken on a clerk's transcript has been reversed.

Petitioner's petition for writ of certiorari was granted by the United States Supreme Court on June 20, 1966 (R. 35).

On or about October 10, 1966, Attorney David W. Belin of the Des Moines, Iowa, Bar was appointed by this Supreme Court to represent the petitioner.

Summary of Argument

Under Iowa law, petitioner had an appeal as a matter of right. Petitioner, an indigent, did not receive effective assistance from his court-appointed counsel, who failed to file any transcript or abstract of record before the Iowa Supreme Court and who also failed to file any brief or argument. Therefore, pursuant to Iowa statute and State Supreme Court Rules, the case was submitted to the Iowa Supreme Court on a "Clerk's Transcript", which is not a transcript of the evidence but rather is a collection of miscellaneous documents and papers. The clerk's transcript system is a whitewash form of appeal, totally void of substance. It is either *per se* unconstitutional or, in the alternative, it may not be used to dispose of indigent criminal appeals without adequate safeguards to guarantee that indigent criminal defendants such as petitioner will have due process and equal protection of the law, which petitioner did not have under the facts of this case.

The constitutional rights of petitioner were also violated because he did not have effective assistance of counsel. Although court-appointed counsel advised petitioner and served notice on the Attorney General that a printed record on appeal and a printed brief and argument would be filed on behalf of petitioner, in fact court-appointed counsel did absolutely nothing. Total inaction surely cannot be held to be effective assistance of counsel.

If counsel would have effectively assisted petitioner, at the very least he would have prepared a record and a brief and argument concerning the ultimate merits of the appeal, for the facts showed that the private written communications of the petitioner were unconstitutionally used as evidence against him by the prosecution. These personal papers were removed from petitioner's possession and placed in a safe at the Des Moines city jail at the time of initial booking. They were removed from the safe by the state without the consent of the petitioner and without warrant and were used by a police officer for evidentiary purposes of handwriting comparison in a prosecution for uttering a forged instrument. Under the facts in this case, it was a violation of petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I.

There Was a Violation of the Constitutional Rights of the Indigent Petitioner Under the Fourteenth Amendment to the United States Constitution Where He Had an Appeal as a Matter of Right Under Iowa Law and Where State Appellate Procedure (1) Gave to Petitioner's Court-Appointed Counsel Unreviewable Discretion to Decline, Without Petitioner's Consent, to Submit on Appeal a Transcript, Abstract or Summary of the Trial Record or Brief or Argument in Support of the Appeal, and (2) Permitted the Appellate Court to Affirm Petitioner's Conviction Solely on the Basis of a Collection of Miscellaneous Papers Known as a "Clerk's Transcript", Which Does Not Include a Transcript, Abstract or Summary of the Trial Record or a Brief or Argument in Connection Therewith.

> "The matter of appeal by a defendant in a criminal case is not discretionary in Iowa. He may appeal as a matter of right. Section 793.1, Code, 1962, provides that either the defendant or state may appeal." *Weaver* v. *Herrick*, 140 N.W.2d 178, 180 (Iowa 1966).

The equal protection clause of the Fourteenth Amendment requires that where an indigent has as of right an appeal, the state must furnish counsel at its own expense. *Douglas* v. *California*, 372 U.S. 353 (1963). Where there is no counsel,

> ". . . only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a cham-

pion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required." 372 U.S. at 356.

In the case at bar, the error of the California courts in *Douglas v. California, supra,* was compounded: Petitioner Entsminger had no counsel championing his cause on appeal and moreover the Iowa Supreme Court did not have a satisfactory record upon which to make even an *ex parte* examination. Rather, the only thing before the Supreme Court of Iowa was a "clerk's transcript". The clerk's transcript is defined by Section 793.6 of the Code of Iowa, 1962, to include "... all record entries in the cause, together with copies of all papers in the case on file in his office, except those returned by the examining magistrate on the preliminary examination, all duly certified under the seal" of the clerk of court. Thus, the clerk's transcript has absolutely nothing whatsoever to do with the transcript of the evidence of the trial.

What happened in this case was that the court-appointed attorney, Henry Wormley, did nothing after serving notice on the Attorney General of Iowa that he (Wormley) desired to submit the case upon a printed abstract of record and brief and argument. By operation of Iowa Supreme Court Rules 15 and 16, the case was then submitted on a clerk's transcript.

Since the Iowa Supreme Court did not have the benefit of the record in the case, and did not have the benefit of any briefs and arguments of counsel, it had one of two choices: (1) the Court could affirm the conviction on the

basis of the purported record before it; (2) the Court could have directed Mr. Wormley to bring before the Court the record and a brief and argument or in the alternative could have caused another attorney to be appointed to represent petitioner Entsminger.

The Iowa Supreme Court elected the first alternative and summarily affirmed the conviction at 137 N.W.2d 381.

Although in form, the clerk's transcript system provides for a method of appeal before the Iowa Supreme Court, in substance this method of appeal is a "white wash". According to an analysis by Gilbert Cranberg of the editorial staff of the *Des Moines Register*, there are ". . . 30 to 40 criminal cases decided each year by the Iowa Supreme Court on the basis of . . . 'clerk's transcript' appeals." See Cranberg, "Right of Poor to Full Court Appeal", November 14, 1965, *Des Moines Register*. This means that over the past fifteen years approximately 500 clerk transcript appeals have been decided. An analysis of all clerk transcript appeals before the Iowa Supreme Court in the past fifteen years has disclosed no case where a conviction by a trial court was reversed on a clerk's transcript appeal. *Res ipsa loquitur.*

This Supreme Court held in *Eskridge* v. *Washington State Board,* 357 U.S. 214 (1958) that even though a transcript might not be a legal prerequisite to appeal, it could not be withheld from an indigent upon a mere unreviewable finding by the trial court that "justice would not be promoted" by providing the transcript. Similarly, *Draper* v. *State of Washington,* 372 U.S. 487 (1963), established that a transcript may not be denied an indigent upon the unreviewable finding by a trial court that an appeal would be

"frivolous." These cases clearly indicate the justifiable view taken by this Court that full and adequate appellate review cannot be secured, in fact, unless the reviewing court has before it *some* kind of transcript, abstract, or complete summary of the trial record.

In *Draper* at 372 U.S. 497:

> "The materials before the State Supreme Court in this case did not constitute a 'record of sufficient completeness,' see *Coppedge* v. *United States,* 369 U.S. 438, 446, 82 S.Ct. 917, 921, 8 L.Ed.2d 21, and p. 780 for adequate consideration of the errors assigned. No relevant portions of the stenographic transcript were before it. The only available description of what occurred at the trial was the summary findings of the trial court and the counter-affidavit filed by the prosecutor. The former was not in any sense like a full narrative statement based upon the detailed minutes of a judge kept during trial. It was, so far as we know, premised upon recollections as of a time nearly three months after trial and, far from being a narrative or summary of the actual testimony at the trial, was merely a set of conclusions. The prosecutor's affidavit can by no stretch of the imagination be analogized to a bystander's bill of exceptions. The fact recitals in it were in most summary form, were prepared by an advocate seeking denial of a motion for free transcript, and were contested by petitioners and their counsel at the hearing on that motion."

Justice White in his dissenting opinion in the *Draper* case urged that the record before the Washington Supreme

Court was an adequate record substantially equivalent to a transcript and was therefore satisfactory:

> "Following petitioners' conviction and the denial of the motion for a new trial, petitioners filed a motion before the trial court setting forth their claimed errors and requesting a transcript for purposes of appeal. The State, opposing the request for a transcript, responded by presenting the evidence at the trial in a narrative form by affidavit of the prosecuting attorney. A hearing was held at which both the attorney who represented the petitioners at the trial and the petitioners themselves were free to challenge the accuracy of the State's narrative of the facts or to supplement it in any way. The statements and arguments of petitioners and their attorney at the hearing were included in the material before the Supreme Court and added considerably to the State's summary, as did the court's oral opinion and the colloquies between the court and petitioner Draper. Finally, the court, as it was required to do, entered findings of fact setting forth the evidence at the trial and ruling upon each error claimed by petitioners. The findings, as well as the court's statements during the conduct of the hearing, went substantially beyond the summary presented by the State and were expressly intended by the trial judge to set forth the 'substance of the testimony' so that the matters relied upon by petitioners could be presented to the Washington Supreme Court.
>
> "We thus have a situation where the court, in good faith, utilizing its own knowledge and information about the trial and with the help of the State, the defendants and their counsel, in effect prepared and

> settled a narrative statement of the evidence for the use of the appellate court in passing upon the merits of the alleged errors. The record before the Washington Supreme Court contained not only the findings made by the trial judge after a hearing, but also everything said at the hearing by the defendants, by their attorney and by the prosecutor. Furthermore, briefs were filed in the Supreme Court of Washington and the court heard oral argument by appointed counsel." See 372 U.S. 500-501.

In other words, in *Draper* this Court agreed unanimously that there must be some kind of adequate record before the appellate court.

In contrast to the *Draper* case, the Iowa Supreme Court in this case had no transcript nor did it have an adequate record substantially equivalent to the transcript. Moreover, no briefs were filed by the court-appointed counsel nor was there any oral argument. Rather, there was a total default on the part of the appointed counsel.

Once counsel has been appointed, it is his duty to provide his client "effective aid in the preparation . . . of the case." *Powell* v. *Alabama,* 287 U.S. 45 (1932). The definition of "effective aid" is fraught with difficulty, once counsel has acted. If hindsight is used to judge the actions or mistakes of court-appointed counsel, the flood gates could be opened to spurious petitions. Thus, courts have been generally unwilling to review the wisdom of trial tactics where court-appointed attorneys actually participated in the defense of an indigent. See note, "Effective Assistance of Counsel for the Indigent Defendant", 78 Harvard Law

Review 1434 (1964-1965) and note, "Effective Assistance of Counsel", 49 Va. L. Rev. 1531, 1540-42 (1963).

However, in the case at bar we are not faced with any such problems, for surely there can be no argument that total default of action is not effective assistance of counsel for the indigent defendant.

It is well established that courts have a responsibility beyond the naked appointment of counsel to represent an indigent; the representation must not only be in form, but it must have effective substance. This principle has been applied to trial as well as to appellate court appointment. In *Glasser* v. *United States*, 315 U.S. 60 (1942) appointed counsel was required by the trial court to represent two indigent defendants with possibly conflicting interests. Although that case arose more than twenty years before *Gideon* v. *Wainwright*, 372 U.S. 792 (1963), this court stated:

> "Even as we have held that the right to assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than

this, a valued constitutional safeguard is substantially impaired." 315 U.S. 70. See also *Avery* v. *Alabama*, 308 U.S. 444 (1940).

In 1963 this Supreme Court decided *Lane* v. *Brown*, 372 U.S. 477 (1963) in which the Public Defender refused to represent the indigent Brown on appeal because of a stated belief that an appeal would be unsuccessful. Brown next applied to the State Trial Court for a transcript and appointment of counsel, and this was refused. At 372 U.S. 485, the Supreme Court concluded:

> "The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards."

In a separate concurring opinion Justice Harlan stated at 372 U.S. 485-486:

> "I think it falls short of the requirements of due process for a State to foreclose an indigent from appealing in a case such as this at the unreviewable discretion of a Public Defender by whom, or by whose office, the indigent has been represented at the trial. It ignores the human equation not to recognize the possibility that a Public Defender, so circumstanced may decide not to appeal questions which a lawyer who has had no previous connection with the case might consider worthy of appellate review. (I do not of course remotely intimate that such is the situation here.)
>
> Were it clear that the decision of this Public Defender not to appeal had been subject to judicial review at the

instance of the prisoner, I should have voted to sustain this conviction. However, the State Attorney General has candidly informed us that the Indiana law is unclear on this score."

There is no lack of clarity in the Iowa law. Where appointed counsel does nothing to file a printed abstract of record or a brief and argument, the case automatically goes up on the "Clerk's transcript".

It is the Clerk's transcript system which permits *sub rosa* withdrawals by counsel by providing the form of appellate review with total lack of substance. On March 9, 1965, the court-appointed attorney Henry Wormley wrote petitioner:

"... Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the record.

I am not unmindful of the time that past and the rules of the Supreme Court. As to how I present this case and what I put in the Brief and argument will be matters that I will pass upon accordingly to my best Judgment ...

... When the papers have been prepared, they will be forwarded and I do not have the time to write you as to every move that I make in this case" (R. 30).

The record, when completed, did show what court-appointed attorney Henry Wormley had taken care of: Nothing. And the Clerk's transcript system took care of Wormley's default.

The Petitioner therefore prays that this Supreme Court hold either that the Clerk's transcript system is *per se* un-

constitutional or in the alternative, that it may not be used to dispose of an indigent criminal appeal unless there are established safeguards which were not present in this case to guarantee that indigent criminal defendants will have due process and equal protection of the laws under the Constitution of the United States.

II.

Where Iowa Law Provides for Appeal as a Matter of Right, and Where the Lawyer Appointed by the Court to Represent the Indigent Petitioner Did Nothing to Prepare and File a Transcript, Abstract or Summary of the Trial Record or Brief or Argument on Appeal, Petitioner Was Denied the Effective Assistance of Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner Entsminger desired to take an appeal to the Iowa Supreme Court from his trial court conviction. Pursuant to his request a new attorney, Henry Wormley, on October 23, 1964, was appointed to take an appeal on behalf of the petitioner to the Iowa Supreme Court (R. p. 20). The State provided at its own expense a transcript (see Exhibit A) of the entire trial (R. p. 20).

On March 8, 1965, Attorney Wormley served the Attorney General of Iowa notice advising "that the defendant desires to submit the above-entitled case upon a printed abstract of record and brief and argument" (R. p. 25).

The very next day Attorney Wormley wrote the defendant that he (Wormley) would prepare the record and would exercise his best judgment in determining how to

present the case and "what I will put in the brief and argument . . ." (R. p. 30).

The judgment of Attorney Wormley was to do nothing. On October 8, 1965, Petitioner Entsminger filed a petition for a writ of certiorari in the Supreme Court of Iowa which alleged the appointment of Wormley to represent him, the statement by Wormley in a March 9 letter to petitioner that the record and brief and argument would be prepared by Wormley, and a letter dated September 1 from Wormley alleging that the case would be decided on the "record" (R. pp. 27-29. See Exhibit 2, R. pp. 31-32). In the concluding allegation in his petition for writ of certiorari to the Supreme Court of Iowa, Petitioner Entsminger alleges: "Plaintiff has ineffective assistance of counsel on the one appeal plaintiff has as of right" (R. p. 29).

On October 18, 1965, the Supreme Court of Iowa entered an order denying the petition for writ of certiorari on the ground ". . . it is not filed within the time provided by Rule 319, Rules of Civil Procedure" (R. p. 32). (Rule 319 declares: "No writ of certiorari shall issue or be sustained unless the petition is filed within six months from the time the inferior tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally.")

These facts speak for themselves. What we have is the mere formality of an attorney appointed by the court to represent an indigent defendant on the one appeal he has as a matter of right. But the formal appointment is void of any substance. Petitioner believes that under the record in this case there has been a violation of his rights guaranteed under the Constitution of the United States. Let us examine the cases.

Our starting point is that the State of Iowa does allow an appeal to its Supreme Court as a matter of right. *Weaver* v. *Herrick*, 140 N.W. 2d 178 (1966); Section 793.1, Code of Iowa, 1962.

Where under state law a defendant has an appeal as a matter of right, this Court has held that the equal protection clause of the Fourteenth Amendment requires that an indigent be afforded counsel on appeal. *Douglas* v. *California*, 372 U.S. 353 (1963). In *Douglas*, this Court declared:

> "• • • But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.
>
> • • • There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 372 U.S. at 357-358.

Given these reasons for requiring the appointment of counsel, it is obvious that there is an implicit requirement that an indigent's right to counsel on appeal cannot be satisfied by the mere formal appointment of a member of the bar, who, after his appointment, does nothing to assist the indigent in prosecuting the appeal.

This right to an effective appointment of counsel has been recognized by this Court in trial situations. *Powell* v. *Alabama,* 287 U.S. 45 (1932), *Glasser* v. *United States,* 315 U.S. 457 (1942). But it has never explicitly been recognized by this Court to exist in an appellate situation.

That it does so exist is implicit in the phrase, "equal protection of the laws". This Court has never held that equal protection of the laws can be satisfied by a mere hollow formality. Moreover, there surely can be no difficulty for the purposes of the Fourteenth Amendment in attributing to the state the whole ineffective assistance of counsel caused directly by the activities of a court-appointed attorney. *Schaber* v. *Maxwell,* 348 F.2d 664 (6th Cir.), *United States, ex rel. Taylor* v. *Reincke,* 225 F.Supp. 985 (D.Conn. 1964), *Coffman* v. *Bomar,* 220 F.Supp. 343 (M.D. Tenn. 1963), *Grubbs* v. *Oklahoma,* 239 F.Supp. 1014 (E.D. Okla. 1965).

However, assuming arguendo that in the usual case there would be hesitation in imputing failures of appointed counsel to the state for purposes of the Fourteenth Amendment, there is in this case an added element which demands such imputation. That element is that when petitioner filed his "Petition for Writ of Certiorari", the Iowa Supreme Court was made aware that counsel's allowing the case to be submitted on a clerk's transcript was done without the approval of the petitioner (R. 27-29). Nevertheless, the Court failed to investigate the situation or to require some explanation from petitioner's counsel. Therefore, it is clear that counsel's failure can easily in this case be imputed to the Supreme Court of Iowa.

Moreover, as shown in the Appendix, *infra,* petitioner received correspondence from the Assistant Attorney Gen-

eral of Iowa which misled petitioner to assume that his appeal was being diligently prosecuted.

Unfortunately, petitioner's assumption of effective representation was false. His court-appointed counsel on appeal made no argument to the appellate court, submitted no briefs, and did not even cause a copy of the trial transcript to be deposited with the Supreme Court of Iowa. Except for an occasional letter to the petitioner, counsel took only two actions in regard to the appeal: He filed a timely "Notice of Appeal", R. 14; and he filed an untimely "Notice of Intention to File Printed Abstract of Record" (R. 25). Of course, this latter notice was of no consequence because no printed abstract of record was ever filed by counsel.

From petitioner's point of view, this inactivity was made even more cruel than it might otherwise have been by continual representations by his counsel that the appeal would be prosecuted fully. In his "Petition for Writ of Certiorari" to the Supreme Court of Iowa, petitioner enclosed as exhibits letters from his counsel to him; in one of these letters, counsel told petitioner, "Your case was appealed to the Supreme Court and as soon as I receive the transcript from the Court Reporter, then I will make the Record" (R. 30).

In addition, petitioner's belief that a full appeal was in progress was encouraged by the reasonable assumptions of the Assistant Attorney General expressed in letters to petitioner that there would be a complete appeal. See Appendix to Brief. It was not until shortly before petitioner submitted his "Petition for Writ of Certiorari" to the Supreme Court of Iowa that he was finally informed, more than ten months after the Notice of Appeal was filed,

that his counsel did not intend to prosecute fully the appeal (even though Wormley had seven months earlier submitted notice that he intended to do so (R. 25)). As a result of these representations and vacillations by counsel, petitioner was reasonably led to believe that he would receive a complete appeal. But what petitioner really received was nothing.

Although the record indicates otherwise, it is possible that counsel for petitioner made a good faith decision at some time not to prosecute the appeal because he believed there were no grounds for appeal. Even so, such a decision, if it occurred, occurred too late. The Supreme Court of Iowa waited seven months for counsel to carry out his written stated intention to submit the appeal on printed abstracts, briefs and arguments. Counsel filed nothing. Therefore, the Iowa Supreme Court assumed that the appeal would be prosecuted no further and in accordance with Supreme Court Rules 15 and 16 reviewed petitioner's conviction by means of its dubious automatic clerk's transcript procedure. Counsel, late even in filing notices of intentions which were never carried out, clearly was not effective counsel on appeal.

In circumstances very similar to the case presently before the Court, lower Federal Courts have found denials of due process and equal protection. In *Coffman* v. *Bomar*, 220 F.Supp. 343 (M.D. Tenn. 1963), counsel for an indigent failed to file a timely Bill of Exceptions as required by local state procedure. The Court assumed that the failure was in good faith, but it nevertheless stated at 220 F.Supp. 348:

> "Moreover, the decision of the attorneys not to appeal, contrary to the wishes of petitioner, coupled with their

failure to so advise the petitioner, even conceding that there was no lack of good intent, amounted to an actual deception, just as effectively depriving him of his right to appeal as did the suppression of documents by prison wardens in the Cochran and Dowd cases."

The Court then continued at 220 F.Supp. 348-349:

"As a part of its system of appellate review to protect indigent defendants Tennessee has placed definite responsibilities in capital cases upon the trial judge, the official court reporter, the clerk, and upon court-appointed counsel to take the necessary procedural steps to effectuate an appeal. The clear meaning of the controlling statutes is that the duty of court-appointed counsel in such cases does not end with the filing of a new trial motion but continues at least to the point that they are required to file a timely bill of exceptions to the end that the right of an appellate review may not be lost. The same statute further provides that in the event of an appeal court-appointed counsel shall be entitled to receive from the state mileage at a prescribed rate from the town of his residence to the point where the Supreme Court shall sit. T.C.A. Section 40-2013. Thus, court-appointed counsel in such cases in a very real sense constitute a part of the system whereby the state in capital cases seeks to protect the indigent defendant with respect to an appellate review of his conviction. Having in these cases specific statutory duties to perform in connection with an appeal not imposed upon attorneys generally, any default on their part in this respect must be attributed to the state in testing the application of the Fourteenth Amendment."

A similar situation arose in *Grubbs* v. *Oklahoma*, 239 F. Supp. 1014 (E.D. Okla. 1965). The record showed that:

> ". . . whereas the public defender considered himself as the attorney for the petitioner for appellate purposes and assumed the responsibilities as such that in fact he rendered the petitioner no legal assistance in connection with this appeal to include not only not giving the necessary notice of appeal but took no steps to obtain an extension of time to make and serve case-made, to obtain for petitioner the continued status as an indigent, request the trial record and case-made at state expense on the basis of indigency, or take any of the other customary steps in connection with perfecting an appeal. Nor did the public defender request permission of the Court to withdraw as attorney for the petitioner for the purposes of appeal. The record does not disclose that the public defender reported his feelings about not appealing the case to the state trial court. Under these circumstances the state trial court did not, of course, explain to the petitioner his rights and essential procedures in connection with an appeal, and did not appoint other counsel for petitioner. And the petitioner having the right to consider himself as being represented on appeal by the public defender did not make request of the state trial court for the appointment of other counsel for the purposes of his appeal until about June 30, 1964, in a document filed with the trial Court he stated he was without the assistance of counsel. The Court did not then appoint other counsel."

See 239 F.Supp. 1016-107.

The Court concluded that the petitioner's constitutional right of appeal and his right to the equal protection of the laws was denied because of the ineffective assistance by the Court-appointed counsel " . . . not conforming to the wish of his client and taking the necessary action to protect his rights by appealing his conviction and sentence. It would appear that the decision not to lodge an appeal is a personal decision residing in the convicted individual and it is not a matter resting within the exclusive discretion and authority of his counsel whether court-appointed or not." 239 F.Supp. at 1018.

Petitioner has extensively quoted from these lower federal court decisions because petitioner believes that these courts have stated petitioner's argument extremely well in analogous factual situations.

This Supreme Court has in the past imposed careful safeguards to prevent depriving an indigent of a full appeal when such an appeal may be warranted.

In *Burns* v. *State of Ohio,* 360 U.S. 252 (1959), this Court held that a state law requiring a filing fee as a requisite to a direct appeal violated the Fourteenth Amendment. In *Griffin* v. *Illinois,* 351 U.S. 12 (1956), this Court held that the Fourteenth Amendment requires the State to provide a transcript to an indigent for purposes of appeal, at least where State law makes the filing of a transcript a requisite to appeal. In *Eskridge* v. *Washington State Board,* 357 U.S. 214 (1958), this Court held the Fourteenth Amendment was violated when a transcript was denied an indigent (without review) after a preliminary determination by the trial court under a state statute allowing the trial court to furnish a free transcript only "if in his opinion justice

will be thereby promoted." In *Draper* v. *Washington, supra,* this Court held the Fourteenth Amendment was violated when the only review secured by the indigent was appellate review of the trial court's refusal, on the grounds of frivolity, to furnish a transcript when such appellate review had the benefit only of a record of the trial court hearing on the issue of frivolity, and no record of what occurred at the trial. The *Draper* case clearly establishes that a transcript or adequate substitute may not be denied an indigent by the unreviewable preliminary determination of the trial court.

In *Lane* v. *Brown,* 372 U.S. 477 (1963), the Court struck down a provision which conferred ". . . upon a state appointed officer outside the judicial system power to take from an indigent all hope of any appeal at all." See 372 U.S. at 475. The facts at bar disclose that the court appointed attorney, through total inaction, in substance exercised this same power that was held unconstitutional in *Lane.* If it is unconstitutional for a court appointed attorney to affirmatively exercise unreviewable discretion to prevent an appeal, how can it be constitutional for a court appointed attorney, through default, to reach the same effective result?

In *Ellis* v. *United States,* 356 U.S. 674 (1958), this Court made clear that, at least in the Federal Court System, the appellate court must establish certain safeguards to assure that counsel for an indigent examines the record from the stance of an advocate, and does not withdraw if there is a possibility of grounds for appeal. This Court stated, at 356 U.S. 675:

"• • • In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of *amici curiae.* But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If *the court is satisfied* that counsel has diligently investigated the possible grounds of appeal, *and agrees* with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." (Emphasis supplied.)

Lower federal courts have imposed additional safeguards to prevent withdrawal of counsel for indigents when there may be possible grounds of appeal. In *Tate* v. *United States,* 359 F.2d 245 (D.C.Cir. 1966), and *Johnson* v. *United States,* 360 F.2d 844 (D.C.Cir. 1966), the Court of Appeals for the District of Columbia Circuit established that before counsel will be permitted to withdraw, he must submit to the court a statement, which "is to be similar to a brief," *Johnson* v. *United States,* 360 F.2d at 845, in order to report fully that no nonfrivolous issues are present. Petitioner contends that the policy of *Ellis* v. *United States* is more than a policy of the Federal Court System.

The United States Constitution requires that where an indigent criminal has an appeal as a matter of state right, no court appointed counsel has the unreviewable discretion to destroy that right of appeal through unsupervised default or withdrawal. Petitioner is not asking for any new extension or interpretation of the United States Constitution, for indeed the foundation for petitioner's position is well within the framework of *Douglas* and *Griffin.* Inherent in the basic doctrine established by *Douglas* and *Griffin* of

equal access to the appellate system of our states is the principle of a Constitutional safeguard so that an indigent will not be deprived of a full and adequate review at the mere whim or caprice of his court appointed counsel.

(The need for such a safeguard is all the more illustrated where there are procedures similar to the "clerk's transcript" system in Iowa, which automatically covers up the default of the court appointed counsel.)

In the Federal Court system, an indigent may, in some circumstances, be deprived of a full and adequate appeal by a finding by both the District Court and the Court of Appeals, that his appeal *in forma pauperis* is not taken in good faith, *28 U.S.C. Sec. 1915(a). Coppedge* v. *United States,* 269 U.S. 438 (1962), however, establishes for the Federal system the same safeguards which were subsequently established for the states by *Draper.* Under *Coppedge,* if the District Court finds the appeal *in forma pauperis* not to be in good faith, the Court of Appeals, merely from an examination of papers other than the transcript, may nevertheless *grant* to the indigent a full and adequate appeal. However, if the Court of Appeals is not disposed to grant leave to appeal *in forma pauperis* after such a perusal, it must follow the strict safeguards established by this Court. These safeguards include both the assistance of counsel and a record of sufficient completeness:

> "• • • If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient

completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed. If, with such aid, the applicant then presents any issue for the Court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed." *Coppedge* v. *United States*, 369 U.S. at 446.

Relatively crude and direct deprivations by the State of full and adequate appeals have also been held unconstitutional, such as the disallowance by prison officials of correspondence between a prisoner and the appellate court, *Dowd* v. *United States*, 340 U.S. 206 (1951), and failure of courts and clerks to answer inartistic requests from indigents. *Coffman* v. *Bomar, supra, Kershner* v. *Boles*, 212 F.Supp. 9 (N.D.W.Va. 1963), affirmed 320 F.2d 284, cert. denied 372 U.S. 923.

Under all of these authorities the principle is clear: Equal protection must be more than mere sham of form; equal protection demands substance, and under the facts of this case, the appointment of counsel was totally lacking in substantive effect.

The only remaining question concerns whether or not petitioner consented or acquiesced in the activities of his court-appointed counsel. On this the record is clear. From the moment of his conviction, petitioner expressed a desire to appeal. See Exhibit "B". He was affirmatively led by his counsel to believe that a full appeal was in progress (R. 30). He was also led by the Assistant Attorney General of Iowa to believe that the court-appointed counsel would diligently prosecute the appeal. See Appendix. Finally, when petitioner found out his counsel's belated decision not

to prosecute fully the appeal, petitioner filed a *pro se* petition for certiorari to the Supreme Court of Iowa in which he specifically complained of the conduct of his counsel (R. 27-29). Paradoxically, petitioner assumed that the Iowa Supreme Court would have before it the full record of the trial court. No doubt this assumption was based on the correspondence of appointed counsel that at least the Supreme Court would have the record before it (R. 31-32).

Under the record in this case, petitioner respectfully submits that he did not receive the equal protection of law and the due process of law guaranteed to this petitioner under the Fourteenth Amendment to the Constitution of the United States.

III.

Where the Private Correspondence of an Accused Is Removed From His Possession and Placed in a Jail Safe at the Time of His Initial Booking, and Where Without the Consent of the Defendant and Without Warrant These Personal Papers Are Removed From the Safe by the State for Evidentiary Purposes of Handwriting Comparison in a Prosecution for Uttering a Forged Instrument, There Is a Violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and a Violation of Article I, Sections 8, 9 and 10 of the Constitution of the State of Iowa.

At the time of his arrest, petitioner's personal correspondence was taken away from him and placed for safekeeping purposes in a safe in the Des Moines city jail. Without his consent, and without warrant, these personal papers were taken by a Des Moines police officer and used for evidentiary purposes of handwriting comparison to prove

a forgery. The testimony of this police officer, over objection, was introduced into evidence against petitioner and formed an important part of the prosecution's case (see Exhibit A). Under these circumstances petitioner claims a violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and also claims a violation of Sections 8, 9 and 10 of Article I of the Constitution of the State of Iowa.

The letters seized by the police in this case were personal communications of the petitioner. They did not relate to any crime. Thus, the seizure and use as evidence of petitioner's papers in this case is distinct and different from the seizure and use sanctioned by this Court in *Stroud* v. *United States,* 251 U.S. 15 (1919), in which incriminating letters written by the accused while he was in prison, and in regard to a crime occurring while he was in prison, were censored by the warden and turned over to the prosecutor's office. The court in that case emphasized that the letters came into the warden's hands under established censorship procedures of which the defendant was aware. In addition, the *Stroud* case is clearly distinguishable from the present case in that in *Stroud,* the accused was a convicted prisoner at the time the letters were secured by the warden: If there is justification for infringing the civil rights and the privacy of a convicted prison inmate in regard to letters written by him while in prison, this justification does not apply to an arrestee in regard to letters written by him before he was arrested, especially when he has not attempted to mail or remove the letters from their place of safekeeping in the jail and where the contents of the letters do not relate to and are not even suspected of relating to the actual commission of a crime.

The mere fact that a search is legal, or that the police have physical possession of an accused's property, does not, of course, mean that any such property in their possession or discovered during a legal search may be seized for use as mere evidence against the accused. As this Court stated in *Abel* v. *United States*, 362 U.S. 217 (1960):

> "... We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled* v. *United States*, 255 U.S. 298."

Generally, the delineation between what may be seized and what may not be seized in a lawful search has been between contraband and instrumentalities on the one hand, and mere evidence on the other. The historical and policy justifications for this distinction were well explained by this Court in *Gouled* v. *United States*, 255 U.S. 298, 308-9 (1920), when this Court stated:

> "... at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed.
>
> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution,

and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks Cases, supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. *Boyd Case,* pp. 623, 624.

"There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, *Langdon* v. *People,* 133 Illinois 382, and lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth* v. *Dana,* 2 Metc. 329, and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds."

Beyond these statements of principles contained in *Abel* and *Gouled*, it is difficult to harmonize the holdings of all search and seizure decisions within these principles. As this Court stated in *Abel*, 362 U.S. at 235, "The several cases on this subject in this court cannot be satisfactorily reconciled." The difficulty, however, is not limited to this Court; lower courts, in considering the introduction of evidence seized during custody searches or during searches of the person incident to arrest, have on occasion permitted the seizure and introduction of evidence which was neither contraband nor instrumentality, *United States* v. *Alvarado*, 321 F.2d 336 (1963). However, other cases permitting the introduction of evidence seized during custody searches have involved evidence that was clearly contraband or instrumentality, *Baskerville* v. *United States*, 227 F.2d 454 (10th Cir. 1955), *Charles* v. *United States*, 278 F.2d 386 (9th Cir. 1960). Even decisions of this Court, on occasion, have challenged persons attempting to blend the decisions into an easily understood law of search and seizure.

In *United States* v. *Lefkowitz*, 285 U.S. 452 (1931), the introduction of private papers as mere evidence seized during a search incident to an arrest was held unconstitutional where the search extended to drawers and cabinets in the room in which the accused was arrested. This Court, in *Lefkowitz*, devoted its entire discussion to the search of the room and the private papers found therein; it did not discuss, but necessarily affirmed, the Court of Appeals holding that the private papers found on the person of the accused at the time of arrest were admissible even though the papers were neither contraband nor instrumentality. This result is clearly difficult to reconcile with the statement

in *Abel* that "private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them."

Thus, *Lefkowitz* cannot be read as holding that private papers are, per se, admissible unless it were contended that the statement in *Abel* and the holding in *Gouled* apply only to searches of premises and not of persons. Such an interpretation, however, would be a distinction without a difference, because the primary invasion of privacy has occurred in both cases; it is no less an invasion of privacy to examine private papers seized from one's person than to examine private papers seized from one's premises. The Court, in the *Abel* statement and the *Gouled* holding, clearly was not concerned with that primary invasion of privacy resulting from the search; the Court recognized that, even though one has already been subjected to a search, that there can be a further invasion of privacy in the seizure, inspection and reading of private documents found in the course of the lawful search. Petitioner contends that, even if the state had a right to take from him his private papers and to secure them in a safe place, it nevertheless had not the further right to examine, read, analyze and make public in a trial his private writings. This is so particularly, he contends, where it was evident from an initial inspection of the items that they were neither contraband nor an instrumentality of the crime.

A long line of cases of this Court has recognized the protection against invasion of privacy which is afforded by the Fourth Amendment's prohibition against unreasonable search and seizure. In *Boyd* v. *United States*, 116 U.S. 616 (1885), the accused was ordered by the court to produce his private papers. In *Boyd* there was no search, only

an attempted seizure. Therefore, this Court could not have been interested in the affront to privacy caused by unwelcome officials entering and disturbing an individual's premises. The Court could only have been concerned with the invasion of privacy which results from official examination of an individual's private papers. After making clear that it did not base its decision on the Fifth Amendment, the Court emphasized that the essence of the Fourth Amendment was a prohibition against unwarranted invasion of personal privacy:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. *It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.* Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.* In this regard the Fourth and Fifth Amendments run almost into each other." *Boyd* v. *United States*, 116 U.S. 616, 630 (1885). (Emphasis supplied.)

Recently this Court reaffirmed these principles by quoting with approval the foregoing statement from *Boyd* in its landmark decision of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), where this Court established that the exclusionary rule applies to the states through the Fourteenth Amendment. That decision makes necessary a reversal of petitioner's conviction if this Court finds that his private papers introduced into evidence were seized illegally.

In 1965, this Court once again emphasized that the underlying foundation of many specific provisions of the Bill of Rights was protection of individual privacy. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Of course, petitioner recognizes that the right of privacy is not absolute. Thus, in its last determination this Court sanctioned certain invasions into the body of an accused in order that the state may more effectively control the danger to society caused by intoxicated drivers on the highway. *Schmerber* v. *California*, —— U.S. ——, 86 S.Ct. 1826 (1966).

In examining the privilege against self-incrimination claim, this Supreme Court stated at 86 S.Ct. 1832:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in

court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

In the facts at bar the state seized a personal communication—not for the purposes of identification of the defendant but rather in essence to compel the defendant through his own personal communications to testify against himself where he was charged with uttering a forged instrument. Thus, the case at bar is distinguishable from *Schmerber* on the privilege against a self-incrimination claim.

It is also distinguishable from *Schmerber* on the search and seizure claim. We do not have the "special facts" of percentage of alcohol in the blood diminishing shortly after drinking stops and substantive destruction of the evidence by delay. We do not have any relationship between the communications seized and the perpetration of the crime. The papers were neither contraband nor instrumentalities of any crime.

To the state, these private communications were essential to petitioner's conviction. This is demonstrated by the record, Exhibit A. Accordingly, this Court must reverse petitioner's conviction and grant him a new trial to be held without the use of petitioner's private papers as evidence.

Petitioner is well aware of the fact that the record before the Iowa Supreme Court did not include the trial transcript, Exhibit A, and that consequently the Iowa Supreme Court did not have the opportunity to pass upon these

issues under the Constitution of the United States and the Constitution of the State of Iowa. Nevertheless, the entire transcript is before this United States Supreme Court as Exhibit A and petitioner respectfully prays that this Court reverse his conviction and grant him a new trial in accordance with the constitutional principles previously enunciated by this Supreme Court.

Of course, there is a great relationship between this Division III and Divisions I and II, *supra*. Surely, under the facts in this case the appeal of petitioner could not be deemed frivolous and accordingly, his constitutional rights were violated by the lack of effective assistance of counsel and the operation of the clerk's transcript system. As a matter of fact, the injury to petitioner was compounded because had petitioner received effective assistance of counsel, not only would such an appeal have presented to the Supreme Court of Iowa the federal constitutional questions in this Division III but in addition would have presented to the Iowa Supreme Court the similar questions arising under the state constitution.

The state constitutional questions are illustrated by such cases as *Commercial Exchange Bank* v. *McLeod*, 65 Iowa 665, 19 N.W. 329 (1884), which is applicable by analogy to the unreasonable search and seizure provision of the Iowa Constitution, Article I, Section 8. In that case, the Iowa Supreme Court held that property of an arrestee in the hands of a jailer for safekeeping purposes could not be attached. At 19 N.W. 330, the Iowa Supreme Court stated:

> "We think that it cannot be said that the search was unlawful, but when it was ascertained that the money and property were in no way connected with the offense

> charged, and was not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets."

Thus, Police Lt. Dawson could no more remove petitioner's personal communications from the jail safe, without consent of the petitioner, than he could have forcibly removed these papers from his pocket without a warrant.

Unfortunately, because of the lack of effective assistance of counsel and the operation of the clerk's transcript system, the Iowa Supreme Court did not fully review the state constitutional issues in this case. Be that as it may, as shown in this Division III petitioner's federal constitutional rights were violated under the record in this case. The written personal communications of petitioner were used to incriminate him in exactly the same manner as if he had been forced to testify against himself. Moreover, these personal papers were unconstitutionally seized from his person.

For all of the reasons set forth in this Division III, the conviction of petitioner should be reversed.

Conclusion

Every citizen of the State of Iowa as a matter of right can appeal from a felony conviction. The record conclusively shows that petitioner desired to exercise this right. Had he the monetary means, he would have retained competent counsel to present his claim and raise the constitutional issues discussed in Division III.

But petitioner did not have the funds and accordingly as an indigent sought and obtained appointment of counsel by the Iowa District Court. Unfortunately, the court-appointed counsel did not file any abstract or record on appeal. Unfortunately, the appointed counsel did not file any brief or argument. Perhaps this conduct of appointed counsel was through inadvertence or perhaps it was because of a conscious belief that there was no substantive basis for appeal. But regardless of the reason, the effect on petitioner was the same: He did not have effective assistance of counsel on appeal, as was his constitutional right.

What happened to fill the gap caused by this breach of effective assistance of counsel? The automatic operation of the Iowa statutory procedure of a clerk's transcript appeal. It was a sham. It was a whitewash. But nevertheless, it was a final adjudication of petitioner's rights in the state courts.

Petitioner submits that for all of the reasons set forth in Division III, his conviction should be set aside and a new trial granted because of the unconstitutional seizure and use of petitioner's personal communications. But even assuming arguendo, that there might be some disagreement about petitioner's claims in Division III, surely there can

be no disagreement about the fact that petitioner was entitled to have the effective assistance of counsel to present such claims before the Supreme Court of Iowa.

The Constitution of the United States requires more than the mere formality of the appointment of counsel. The Constitution of the United States requires more than the mere formality of a per curiam Supreme Court opinion where that court has never had before it the record of the trial below or any briefs or arguments. Petitioner therefore prays that his conviction be set aside.

Respectfully submitted,

DAVID W. BELIN
300 Home Federal Building
Des Moines, Iowa 50309

Counsel for Petitioner

APPENDIX TO BRIEF

On January 13, 1965, the petitioner filed in the Supreme Court of Iowa a motion for Bill of Particulars which was accompanied by a letter. The petitioner in his motion stated that if the Iowa Supreme Court refused his request to sustain his motion, ". . . the Attorney General should be obligated to give a ruling as to whether a poor person is entitled to counsel when a habeas corpus proceeding is granted" (R. 22-23).

In response to this motion and letter, Iowa Assistant Attorney General Don R. Bennett wrote petitioner on January 21, 1965, the following letter:

"Dear Mr. Entsminger:

"Enclosed is a copy of a Supreme Court order denying your motion for a bill of particulars.

"I am writing you because, in connection with your motion for a bill of particulars, you had requested an opinion from the Attorney General. The documents filed by you with respect to the motion does not clearly set forth your grounds for complaint. I gather, however, that you previously filed a petition for a writ of habeas corpus and had a hearing, during the course of which you were not represented by counsel. Since our records reflect that you presently have pending an appeal from your conviction and in connection therewith are represented by counsel, Henry Wormley, we see no justifiable basis for your complaint set forth in the motion for a bill of particulars. We suggest that your best course of action would be to wait the outcome of your appeal to the Supreme Court.

"Sincerely,

"DON R. BENNETT
"Assistant Attorney General"

Meanwhile, on January 20, 1965, petitioner wrote the following letter to the Attorney General of Iowa:

"Sir:

"Regarding the case of the State of Iowa v. Entsminger, Criminal, Case No. 51568, Polk County Dis*drist* Court, Des Moines, Iowa.

"I would like to bring to your attention my case, this case concerns a poor person who could not afford counsel, so had to depend on a court appointed attorney.

"During three day's of tr*ai*l and Six State Witnesses the only objections entered in this case was when I demanded that certain evidence entered by objected to by my Lawyer this he objected to.

"My attorney d*idn*ot even question two Witnesses, but the main point is during states questioning of Witnesses the prosecuting attorney was in complete control. I was charged with one check in the indictment, but merely *saugh*tered in front of the jury for many checks because my Lawyer, never entered one objection to the prosecuting attorney*s* questioning of Witnesses or the prosecuting attorney*s* arguement to the jury, the transcript will show this *two* be true!

"Sir, on the 9th day of Oct, 1964 I personally complained to the Hon. Judge Needham, tr*ai*l Judge, and requested I be appointed new counsel to aid me in filing motion for new tr*ai*l because I had inadequate counsel during my tr*ai*l, and I quote from the record Judge Needham, statement, I will endeavor to obtain Counsel that will willingly accept appointment.

"That one attorney Mr. Van Vooris of Des Moines, explained to Judge Needham, he did*n*ot want the appointment because he was a friend of my tr*ai*l attorney.

"That in Oct 16, 1964 Mr. Wormley was appointed to represent me on my motion for new tr*ai*l, and was

advised of the situation, and did willingly accept appointment that at first I requested my trail attorney be dismissed, but after ashort talk with Mr. Wormley he was left in for the purpose of giving information to Mr. Wormley, my new attorney.

"Might I say before I go any further that I think Mr. Wormley is a good attorney and he gave a good arguement on motion for a new trail every point he raised I would want raised on motion for new trail or appeal this I agree, but even he completely ignored the fact of inadequate Counsel, during my trail, that I did request new Counsel to file motion for new trail so this point could be raised in my motion for new trail among other errors in my trail. That Mr. Wormley accepted his appointment by the Court willingly but at the time of motion for new trail wouldnot raise the point of inadequate Counsel, that Mr. Wormley had taken an appeal for me and still this point is not being raised in my appeal, and it can be remembered by the trail court this was my reason for the appointment of new Counsel, everything here is of record in the Polk County, Disdrist Court, Except for Mr. Van Voorhis refusing appointment I believe this was in private between him and Judge Needham. The Story I have just told you is the case of the poor person who has no money to afford counsel of his own there is no attorney it seems will go against someother attorney and claim he was inadequate when representing apoor person during trail, this is the reason I didnot release Mr. Wormley and he is filing my appeal. I fine it useless to have the Court keep appointing new Counsel, the reason I ask for them to be appointed is because of inadequate counsel to start with, and yet this point is completely ignored.

"Sir, I am not attorney Im not even to smart but smart eough to know I was not properly represented during my trail and it was a deliberate act on my Court appointed attorney's part.

"Other thing's concerning my experiences with the prosecuting attorneys office in Des Moines, is all during my trail is that I was threatened with other check charge's if I went to trail *Im* being threatened now because of an appeal being *taking*. Why wasn't I charged in the indictment with these charges and had them disposed of before I left to come here they had these check's then.

"If what I have told is due process of Law Sir, I have had my share!!

"I do not know the first thing about getting this matter properly in Court, and will not attempt on my own cause if I did it it would look like some kind of joke out of *abook*. but sooner or later I will find someone who is enterested *eough* to look into this matter *thorley*. I will keep trying until I do Sir. if you cannot do anything concerning this matter I ask that you refer this to Someone who can. I did have inadequate Counsel during my trail also during my motion for new trail and now on appeal, because Mr. Wormley did willingly accept appointment then ignored the issued invalid inadequate Counsel.

"I thank you for your time and consideration. Your acknowledgement Requested.

"Mail this 20th day of January, 1965

"(s) Harvey Entsminger"

Sworn to before me at my office this 20th day of January, 1965.

Notary Public in and for Lee County At Fort Madison, Iowa
My Commission Expires July 4, 1966.

On January 25, 1965, petitioner received, in response to his letter of January 20, the following letter from Don R. Bennett, Assistant Attorney General:

"Dear Mr. Entsminger:

"This will acknowledge your recent letter wherein you allege that you were not adequately represented at trial and that you were unable to bring this fact to the court's attention in connection with your motion for a new trial. You also indicate that the point is not being pressed before the Supreme Court on your appeal. As nearly as I can ascertain from your letter, your major complaint is that the defense attorney did not object to the State's attempt to enter evidence of check charges other than the one you were being tried for.

"Since we have not, as yet, received either a copy of the abstract of record on appeal or a copy of the brief and argument prepared for your appeal, we are not in a position to conclude that the attorney handling your appeal will not raise the points you contend should be in issue. In the event that your contention is not raised in the brief and argument, I suggest that you call this factor to your attorney's attention. If, following that move, the points are still not pressed, I can see nothing objectionable to your drawing up a paper to supplement the brief and argument, setting forth your contention as to how you feel you were denied a fair trial. I am certain that the Supreme Court would accept such a document and give it consideration in passing on your appeal.

"At this point, this is about the only advice I can give you. I do appreciate your position insofar as you are unable to retain your own counsel. If you have further questions I will try to be of assistance to you.

"Very truly yours,

"DON R. BENNETT
"ASSISTANT ATTORNEY GENERAL"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 252

HARVEY LYLE ENTSMINGER,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT

OPINION BELOW

The decision of the Supreme Court of Iowa affirming the judgment of conviction against the petitioner is reported at 137 N.W.2d 381. The opinion will not be reported in the State official reporter, the "Iowa Reports."

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on October 19, 1965. The petition for a writ of certiorari was filed with this Court on December 13, 1965. 28 U.S.C. 1257(3), is the provision upon which the petitioner predicates jurisdiction for this Court's review.

QUESTIONS PRESENTED

1.

Where an indigent defendant desires appellate review of the merits of the proceedings culminating in his conviction and the appointment of counsel to assist him; and where the statutory procedures governing criminal appeals contemplate that plenary review can be obtained by filing a printed record and a brief on the merits; whether the defendant has been deprived of adequate appellate review where court appointed counsel, without the knowledge or consent of his client, failed to file the printed record or a brief on the merits, which failure resulted in appellate review only of the paper comprizing the clerk's transcript with an affirmance of the conviction thereon?

2.

Assuming an affirmative response to the first question, it becomes necessary to ascertain if the indigent defendant is eligible for and can obtain relief from this Court and, if so, the nature of the relief to which he is entitled?

3.

Assuming the Court can and should immediately reach the merits of the petitioner's search and seizure and self-incrimination contentions, the following question is further

presented: Where at the time an accused is booked on a forgery charge and his personal belongings, including papers written by him, are inventoried and placed in a custody locker for safekeeping, whether the papers written by him can constitutionally be used at the trial for handwriting identification purposes?

STATUTORY PROVISIONS AND PROCEDURAL RULES

The statutory provisions and procedural rules relevant to the respondent's Argument are set forth in the Appendix to this brief, pp. A1-A2.

STATEMENT

(Prefatory Comment)

The record (pp. 33-34), reflects that petitioner's counsel has lodged with the Clerk of this Court (1) a certified copy of the criminal trial transcript and (2) a certified copy of a transcript of the subsequent hearing on a motion for new trial and sentencing. These documents have been respectively designated by counsel as Exhibit "A" and Exhibit "B". Though these documents constitute the usual source for the preparation of the abstract of record for a criminal appeal to the Iowa Court, the content of neither was before that Court, in whole or in part, when it reviewed and affirmed petitioner's conviction. Accordingly, they are not, strictly speaking, a part of the record before this Court. We agree, however, that with respect to Exhibit "B" that transcript contains material relevant to petitioner's expressed desire to appeal the criminal judgment and for the appointment of counsel to assist him. We have no objection to counsel accurately referring to that transcript with respect to such matters and in our own Statement we shall, on occasion, allude to Exhibit "B" as a reference.

(The Facts)

On September 14, 1964, a county attorney's information was filed in the District Court of Iowa, Polk County, charging Harvey Lyle Entsminger with uttering a forged instrument in violation of Section 718.2 of the 1962 Code of Iowa (R. pp. 1-2). A plea of not guilty was recorded, trial commenced on October 2, 1964, and on October 6, 1964, the jury returned a conviction (R. pp. 15-17). Judgment and sentencing thereon was set for October 16, 1964 (R. p. 18).

Though the petitioner was represented at the trial by Everett Albers, an attorney from Des Moines, Iowa, three days subsequent to the verdict he requested the trial court to appoint other counsel to assist in preparing and filing a motion for new trial (R. pp. 15, 18, 19, 10). On October 16, judgment date, the court granted the request, appointed attorney Henry Wormley for such purpose, and adjourned until October 23, 1964, to allow new counsel time to prepare the mentioned motion (R. p. 19). The motion for new trial was filed on October 23, 1964, argued, and overruled (R. p. 20). Judgment was entered and the petitioner was sentenced to confinement in the State Penitentiary at Fort Madison, Iowa, for a term not to exceed ten years (R. pp. 20-21).

Immediately following entry of the judgment, the trial court advised Mr. Entsminger that he had the right to appeal the conviction and that in view of his indigency he was entitled to have counsel appointed to assist him, to which advice the petitioner responded "I do want to appeal this case" (Exhibit "B", pp. 31-32). Subsequent to an intervening colloquy of no relevance, he again voiced his desire to obtain appellate review and requested that Mr. Wormley be appointed to assist him (Exhibit "B", pp. 35-36). Counsel stated the appointment

was "all right" with him, whereupon the court granted the request and orally ordered the preparation, without cost, of a transcript of the trial proceedings (R. p. 20, Exhibit "B", p. 36). As reflected by the certificate appended to Exhibit "A", that transcript was completed on December 18, 1964, some 48 days after its preparation was ordered.

A timely and proper notice of appeal was filed by attorney Wormley on November 27, 1964, praying appellate review of the criminal judgment (R. p. 14). For the sake of clarity, it should be noted at this juncture that to secure plenary review of a conviction the Iowa provisions relative to criminal appellate procedure contemplate that within 90 days of the notice of appeal the printed abstract of record shall be prepared and filed with the Supreme Court of Iowa.

Subsequent to the date of the appeal notice, November 27, 1964, up to March 8, 1965, the record reveals no filings in the appeal. On the latter date, petitioner's counsel caused to be served on the Attorney General of Iowa and filed with the Clerk of Court a notice of intention to file the printed abstract and a brief on the merits (R. p. 25). When this notice was actually brought to the Iowa Court's attention, if ever, is not shown in the record; but on the day following its service on the Attorney General the Court took the appeal under submission on the so-called "clerk's transcript" (R. p. 26).[1] On March 11, 1965, the Chief Justice of the Iowa Court entered an order vacating such submission and directed that the petitioner be permitted to proceed with the appeal on the printed abstract and a brief on the merits (R. p. 26). From the date of this

1. The "clerk's transcript appeal" is a prime object of consideration in this action. To aid clarity in this factual statement it should be noted that the "clerk's transcript" is the equivalent of the "mandatory record" considered by this Court in *Griffin v. Illinois*, 351 U.S. 12, 13 note 2.

order, March 11, 1965, until September 21, 1965, the record reflects no further filing by counsel in the appeal. The appeal was again taken under consideration on a clerk's transcript on September 21, 1965, and on October 19, 1965, the Iowa Court entered a per curiam opinion affirming the conviction and judgment thereon (R. p. 33).

While such was the posture of the appeal insofar as appointed counsel was concerned, Mr. Entsminger on or about October 8, 1965, caused to be filed with the Iowa Court an application for a writ of certiorari (R. pp. 27-32). He alleged, inter alia, that court appointed counsel had informed him by letter of March 9, 1965, that when the record and brief were completed the same would be forwarded to him; that counsel again wrote on September 1, 1965, this time stating that nothing would be filed but the "record of the case"; and that in his opinion he was being denied effective assistance of counsel (R. pp. 28-29). Appended to the certiorari application were what purported to be representative copies of the letters above mentioned (R. pp. 30-32). The application for certiorari was summarily denied by the Iowa Court on October 18, 1965, one day prior to its per curiam affirmance of the conviction (R. p. 32).

Summary of Argument

I

The record, which is not of our own making, reflects that the petitioner desired but did not obtain plenary review of the proceedings culminating in his conviction. In this respect, court appointed counsel, without the consent or knowledge of his indigent client, failed to file either the printed record or a brief on the merits with the result that the Iowa Supreme Court reviewed only the papers comprizing the clerk's transcript and affirmed the con-

viction thereon. We have conceded that ordinarily review of a clerk's transcript is not adequate and effective appellate review of the merits of the proceedings culminating in a conviction. We have concluded that in view of the instant record the petitioner is entitled to appropriate relief.

Though not necessary to the disposition of the case, we have set forth what we believe to be the proper obligation of court appointed counsel with respect to an indigent appellant and to the court. The Court has also been informed that the Attorney General has filed a petition with the Supreme Court of Iowa and attached proposed rule changes which, if adopted, would spell out appointed counsel's obligations in this respect.

II.

As the second portion of our Argument, we contend that the relief to which the petitioner is entitled is an appeal free of the constitutional defect present in the first appeal We ask the Court not to reach the issues proffered by the petitioner as to how the conviction is allegedly subject to reversal but rather to remand the case to the Iowa Supreme Court with appropriate directions.

III.

In the final Division of our Argument, we argue that should the Court reach the merits of the petitioner's search and seizure and self-incrimination contentions, the trial record and the case law with respect thereto reflects numerous reasons as to why the search and seizure and self-incrimination contentions are without merit. In this respect, our main argument is that there was no search and seizure in the constitutional sense and that the papers taken into custody at the time the petitioner was booked at the jail could subsequently be used at his trial for handwriting comparison purposes.

ARGUMENT

I.

An Indigent Defendant Desiring Review of a Criminal Judgment Is Constitutionally Entitled to Adequate and Effective Appellate Review Despite His Poverty. In This Respect, a Convicted Indigent Has Not Received Adequate Appellate Review on a Record Disclosing That Court Appointed Counsel, Without the Consent or Knowledge of His Client, Took No Action to Secure Plenary Review with the Result That the Conviction Was Affirmed Solely on the Basis of a Clerk's Transcript. Accordingly, the Indigent Defendant Is Entitled to Relief, the Nature of Which Is Considered in Division II of This Argument.

The instant case presents the continuing problem of what is constitutionally required of a state in administering its criminal appellate procedure with respect to convicted indigents desiring appellate review. The most logical approach to this problem is to first consider the relevant principles established by this Court, after which we shall focus attention on the Iowa scheme of criminal appellate procedure and how it afected the petitioner at bar

What Is Constitutionally Required:

Some ten years ago this Court decided *Griffin* v *Illinois,* 351 U.S. 12, a case presenting the issue of whether Illinois was constitutionally required to furnish, without cost, a copy of the trial transcript to convicted indigents seeking appellate review of their convictions. The Illinois Attorney General conceded that the indigents "needed a transcript to get adequate appellate review of their alleged trial errors but argued that the denial of a free transcript did not violate either the Due Process or Equal Protection clause of the FourteenthAmendment (351 U.S. at 16).

A majority of the Court expressed the opinion that where a state provides a scheme for direct review of criminal judgments it cannot, consistent with the Fourteenth Amendment, deny an indigent defendant adequate and effective appellate review because of the inability to purchase a trial transcript. In the words of Mr. Justice Black announcing the Court's judgment, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts" (351 U.S. at 19).[2]

The issue of "adequate appellate review" despite poverty was subsequently considered in the following cases arising from state courts: *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Burns* v. *Ohio*, 360 U.S. 252; *Lane* v. *Brown*, 372 U.S. 477; *Draper* v. *Washington*, 372 U.S. 487; *Douglas* v. *California*, 372 U.S. 353; *Long* v. *Iowa*, 35 Law Week 4046 (decided December 5, 1966). See also *Smith* v. *Bennett*, 365 U.S. 708. Though certain of these decisions reflect that sometimes there is a lack of agreement

2. Technically, there was no opinion of the Court in *Griffin*. Mr. Justice Black announced the Court's judgment and filed an opinion concurred in by Chief Justice Warren and Justices Clark and Douglas. Mr. Justice Frankfurter wrote a special concurring opinion. Mr. Justice Harlan in a dissenting opinion on the merits contended that neither the Due Process nor Equal Protection clauses required the result reached by the other five Justices. Subsequent decisions seemingly demonstrate, however, that a substantial majority of the Court, if not the entire Court, is now committed to the *Griffin* proposition of adequate appellate review despite poverty. Thus, in *Lane* v. *Brown*, 372 U.S. 477, Mr. Justice Stewart, in speaking for Chief Justice Warren and Justices Black, Douglas, Brennan, White and Goldberg restated as the holding of *Griffin* substantially the proposition set forth in the text. In *Douglas* v. *California*, 372 U.S. 353, decided the same day as *Lane* v. *Brown*, Mr. Justice Clark expressly said that he adheres to his vote in *Griffin* (372 U.S. at 358), and Mr. Justice Harlan wrote that in so far "as the result in [*Griffin*] rested on due process grounds, I fully accept the authority of Griffin" (372 U.S. at 361, note 1). *Long* v. *Iowa*, 35 Law Week 4046 (decided December 5, 1966), presents the most recent case where a unanimous Court is seemingly committed to the proposition announced by Mr. Justice Black.

as to what constitutes "adequate appellate review," e.g., *Draper* v. *Washington* and *Douglas* v. *California*, it appears from a careful reading of the same that the Court is united in its commitment to the following proposition:

> Where a state provides an appellate scheme for reviewing criminal judgments and where a convicted indigent desires to appeal the judgment against him, the state is constitutionally required to afford him full and effective appellate review despite his poverty.

This principle means that if a convicted indigent needs a trial transcript to obtain adequate review it must be furnished to him without cost unless the state provides alternative methods for obtaining such review where a transcript is not necessary, *Griffin* v. *Illinois*, supra; *Lane* v. *Brown*, supra; *Long* v. *Iowa*, supra. Moreover, the majority opinion in *Douglas* v. *California*, supra, reflects the thinking of six members of the Court that the assistance of counsel may well be necessary to assure adequate appellate review. Accordingly, the indigent defendant seeking an appeal is entitled, if he so desires, to the appointment of counsel to assist him, and we suppose it is self-evident that "assistance" means "assistance." Indeed, this Court in speaking in the federal realm has stated that an indigent appellant is entitled to "adequate representation by counsel" and that representation as an amici curiae is not adequate but rather "representation . . . [as] an advocate is required," *Ellis* v. *United States*, 356 U.S. 647, 675.

As a corollary to the constitutional axiom of adequate appellate review despite poverty, the convicted indigent desiring an appeal cannot constitutionally be denied access to review by duress, coercion, fraud or by any other act or failure to act upon the part of the state, *Dowd* v. *United*

States, 340 U.S. 206, 209; *Ford* v. *State*, 138 N.W.2d 116, 119 (Iowa, 1965). Nor may an attorney whose responsibility it is to represent convicted indigents on appeal refuse to take any action in connection therewith and thereby "take from an indigent all hope of any appeal at all." *Lane* v. *Brown*, supra, at 485

What Iowa Provides:

One convicted of a public offense in Iowa can, as of right, appeal the conviction to the Iowa Supreme Court, Section 793.1 of the 1966 Code of Iowa;[3] *Weaver* v. *Herrick*, 140 N.W.2d 178, 180 (Iowa, 1966). A proper notice of appeal served as designated within 60 days of final judgment confers jurisdiction on the Iowa Court to entertain the appeal, Sections 793.2 and 793.4 of the Code. Once the appeal is perfected, the defendant, if indigent, is entitled to and can obtain a copy of the trial transcript at the expense of the appropriate county, Section 793.8 of the Code; *Weaver* v. *Herrick*, supra, at 182.

While an indigent defendant has long had the right to court appointed counsel relative to the prosecution,[4] there has not been nor is there any statutory provision in Iowa specifically requiring the appointment of an attorney to assist in an appeal. Prior to *Douglas* v. *California*, however,

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3. At the time the petitioner was charged, convicted, and perfected his appeal the 1962 Code of Iowa was in effect. The provisions of criminal appellate procedure to be considered in the text, except where otherwise indicated, have remained unchanged, are now found in the 1966 Code of Iowa, and it is that Code which is referred to for convenience.

4. Section 775.4 of the 1962 Code of Iowa, the exact language of which has been in existence for many years, read as follows at the time the petitioner was informed against:

> "Right to counsel. If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two. . . ."

an indigent desiring an appeal could usually obtain such assistance, and since *Douglas* the Iowa Court via case law has recognized that the indigent is entitled to appointed counsel for the appeal, *Schmidt* v. *Uhlenhopp*, 140 N.W.2d 118, 120 (Iowa, 1966); *Weaver* v. *Herrick*, supra. An attorney so appointed is not expected to serve gratuitously but is entitled to be compensated, Section 775.5 of the 1966 Code of Iowa; *State* v. *Griffin*, 135 N.W.2d 77, 80 (Iowa, 1965); *Schmidt* v. *Uhlenhopp*, supra, at 172.

Once an appeal has been perfected, Section 793.17 of the Iowa Code directs that the "record and case may be presented in the supreme court by printed abstracts [and] arguments . . . as provided by *its rules*" (emphasis added). In this respect, Supreme Court Rule 16 (1966 Code, Vol. 2, pp. 3004-3005, see Appendix, infra, pp. A1-A2), outlines the procedure by which a criminal appeal can be brought before the Iowa Court for plenary review of the record and a brief on the merits with oral argument if that is desired.

In general terms, Rule 16 contemplates that within 90 days of the notice of appeal the appellant shall file the printed abstract of record, i.e., an abstract of the trial transcript as believed relevant to the appeal. Following such filing, the Rule directs that the appellant shall have 45 days within which to file a brief on the merits, after which the Attorney General shall respond to the printed record and the brief in the manner prescribed by the Rule. Supreme Court Rule 18, 1966 Code, p. 3305, specifies that the printing, form, content, and required number of copies of the abstract and brief shall otherwise be governed by the Iowa Rules of Civil Procedure. See generally Division XVI of the Rules of Civil Procedure, 1966 Code, Vol. 2, pp. 2980-2987. Furthermore, since July 4, 1965, the effective date of Chapter 449 of the Acts of the 61st

General Assembly, codified in Section 775.5 of the 1966 Code, Iowa law specifically provides for the printing of the record and brief on the merits without cost to an indigent criminal appellant.[5]

The alternative to plenary consideration of the appeal is review solely on the clerk's transcript as provided for by Supreme Court Rule 15, the text of which is set out in the margin.[6] Such review, as a practical matter, results from the failure to file the printed abstract of record within the time provided for in Supreme Court Rule 16. The content of the clerk's transcript is governed by Section 793.6 of the Code which enjoins the clerk of the trial court, when an appeal is taken, to:

> "Promptly prepare and transmit to the clerk of the supreme court a transcript of all record entries in the cause, together with copies of all papers in the case on file in his office . . . all duly certified under the seal of his court."

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5. Section 775.5 of the Code provides that "An attorney appointed by the court . . . shall be entitled to a reasonable compensation . . . and in the event of appeal the cost of obtaining the transcript of the trial and the printing of the trial record and necessary briefs in behalf of the defendant." Prior to the enactment of this statute such printing costs were generally allowed, though the District Court of Iowa, Polk County, the trial court involved here, took the position that it must allow an indigent defendant a free trial transcript but would, on occasion, refuse to order the county to pay for the printing of the abstract and brief. This factor in at least two cases known to this writer caused appointed counsel to request the Iowa Court to permit the filing of the trial transcript in lieu of filing the requisite number of printed copies of the abstract of record. Such permission was granted and plenary review obtained on the full record. As noted in the text, Section 775.5 as it reads now became effective on July 4, 1965. The Iowa Court did not take this case under submission on a clerk's transcript until September 21, 1965.

6. "Court Rule 15. When an appeal is taken in a criminal case and the clerk's transcript of the record, required by section 793.6 of the Code, is filed with the clerk of this court, the cause shall be assigned for submission on such transcript, but the date set for such submission shall be not less than ninety days after the date the appeal was perfected as shown by such transcript." (1966 Code, Vol. 2, p. 3004).

The "transcript" referred to in the statute is the equivalent to the "mandatory record" considered by this Court in *Griffin* v. *Illinois*, 351 U.S. 12, 13, note 2, and ordinarily consists of a copy of the indictment or information, arraignment, plea, verdict, sentence, and sometimes the court's charge to the jury. In the instant case, the clerk's transcript (R. p. 12) also contains a copy of the "motion for a New Trial," though in this writer's experience the inclusion of such a motion is not a practice consistently followed by the clerks of the various trial courts in Iowa. The shorthand report of the trial proceedings is not one of the "papers . . . on file in [the clerk's] office" and, accordingly, the trial transcript is not a part of the clerk's record certified up to the Iowa Court.

What the Petitioner Received:

From the above discussion of criminal review procedure, it is clear that Iowa law provides an appellate scheme whereby an indigent defendant can obtain adequate appellate review of the merits of the proceedings leading to his conviction. The petitioner complains, however, that the system can operate, and did so in his case, to allow appointed counsel the unreviewable discretion to decide not to seek meaningful review. He contends that appointed counsel, without his consent or knowledge, declined to submit the appeal on a printed abstract with a brief on the merits, but rather permitted the conviction to be affirmed on the clerk's transcript. In responding to these arguments we are saddled with a record not of our own making.

The record reflects that petitioner, an indigent, desired to appeal his conviction, requested that counsel be appointed to that end, and caused a notice of appeal to be filed (R. pp. 20, 14; Exhibit "B", pp. 31, 35-36). The printed abstract of record was not filed within the 90 days allowed by Rule 16 and on March 9, 1965, the Iowa Court took the

appeal under submission on the clerk's transcript (R. p. 26).[7] On March 8, 1965, appointed counsel did file and caused to be served on the Attorney General his notice of intention to submit the appeal on a printed abstract and brief (R. p. 25), and this factor was seemingly brought to the Iowa Court's attention and resulted in that Court entering the following order on March 11, 1965:

> "Submission of the appeal . . . on clerk's transcript is hereby set aside . . . and it is ordered that the appeal be submitted on printed abstract [and] briefs and argument . . ." (R. p. 26).

Nothing further was apparently filed by appointed counsel in the appeal; the case was again submitted on a clerk's transcript on September 21, 1965; and on October 19, 1965, Entsminger's conviction was affirmed on the basis of that transcript (R. p. 33).

Predicated on the record before us, we cannot in fairness to the petitioner, discover any argument that he desired less than plenary review of the merits of his conviction. Moreover, it would hardly be candid to suggest that prior to the affirmance on the clerk's transcript Entsminger relinquished the desire for full plenary review or, insofar as the record is concerned, that he was materially responsible for not receiving such review. The pleading filed with the Iowa Court dated October 8, 1965, some 11 days before the conviction was affirmed, contained allegations relative to the manner in which the petitioner believed counsel was handling the appeal (R. pp. 27-29). The letters of appointed counsel attached to that pleading, one of March 9, 1965, and the other of September 1, 1965, seemingly respond to complaints by Entsminger relating

7. There is nothing in the Iowa Supreme Court file relative to *State* v. *Entsminger* showing that prior to March 9, 1965, the petitioner ever sought or obtained an extension of time within which to file the printed abstract.

to the progress of the appeal (R. pp. 30-32). The content of the mentioned letters were such as to reasonably lead the petitioner to suppose that at least a printed abstract, if not a brief on the merits, would be filed. See also the correspondence set forth in the petitioner's brief, Appendix, pp. 53-57.

Such being the posture of the case, the question presented is whether this convicted indigent received adequate appellate review and, if not, whether he is entitled to and can receive relief from this Court. We are forced to conclude that the decisions of this Court, in particular that of *Lane* v. *Brown*, 372 U.S. 477, suggest a negative answer to the first portion of the question and an affirmative one as to the second part.

Brown was convicted of murder in Indiana and sentenced to death. On appeal the conviction was affirmed and his subsequent petition for a writ of error coram nobis was denied by the state trial court. Indiana permitted an appeal from such denial but also required that the coram nobis transcript be filed in such an appeal before jurisdiction attached. In this respect, under Indiana's public defender act of 1945, only the public defender, in his discretion, could order a transcript of the coram nobis hearing for an indigent's appeal and this the public defender refused to do for Brown. Thus, Brown was denied any appeal at all from the lower court's denial of his coram nobis petition. The Court was unanimous in its judgment that Indiana's procedure violated the Fourteenth Amendment. In delivering the opinion of the Court, Mr. Justice Stewart pointed out that *Griffin* v. *Illinois* "held that a State with an appellate system which made available transcripts to those who could afford them was constitutionally required to provide 'means of affording adequate and effective appellate review to indigent defendants' " (372 U.S. at 482). The

Court concluded that the Indiana scheme for obtaining appellate review conferred upon a state officer outside the judicial system "power to take from an indigent all hope of any appeal at all" and that such was not constitutionally permissible. The case was remanded with directions that Brown be discharged "unless within a reasonable time the State of Indiana provides him an appeal on the merits to the Supreme Court of Indiana" (372 U.S. 485).

Apart from the fact that this case deals with a direct criminal appeal, it is distinguishable from *Lane* v. *Brown* in that the petitioner received review on a clerk's transcript and his appointed attorney was not, strictly speaking, a "state officer". We suppose, however, that these distinctions are constitutionally irrelevant if the petitioner was deprived of adequate and effective appellate review of the merits of his conviction. In this respect, it must be admitted that in the usual case review on the clerk's transcript can hardly be labeled adequate and effective review of the merits of the proceedings culminating in the conviction.[8] As noted above the transcript usually contains little more than a copy of the indictment or information, arraignment, plea, verdict, sentence, and sometimes the court's charge to the jury. Indeed, the Iowa Court has recently stated that "[To] afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necessary briefs is required." *Weaver* v. *Herrick*, 140 N.W.2d 178, 181 (Iowa, 1966). Moreover, the petitioner was constitutionally entitled to the appointment of counsel to assist him, *Douglas* v. *California*, 372

8. There are situations where review on a clerk's transcript may produce results favorable to the defendant. Thus, if the transcript contains, as it sometimes does, the lower court's instructions review might be meaningful. To illustrate, an instruction regarding the defendant's failure to testify could result in a reversal, *Griffin* v. *California*, 380 U.S. 609; *State* v. *Johnson*, 138 N.W.2d 518 (Iowa, 1965).

U.S. 353. He had appointed counsel but for reasons not shown of record, counsel gave no assistance; he was, for all practicable purposes, "without benefit of counsel" within the spirit of Douglas, which fact resulted in the merits of the one and only appeal he had of right not being decided. This is not to say that the failure to obtain review of the merits resulted from any inaction on behalf of the Iowa Court; rather it resulted from a scheme which, at least on this record, permitted a court appointed attorney to take no action with respect to an appeal and to so do without consultation with anyone.

In exercising what we would like to believe is considerable circumspection, we have concluded from the record that the petitioner desired but did not obtain the plenary review which was his due, and in keeping with this court's decisions considered above, we must concede that he is entitled to relief, the nature of such relief being a subject for consideration in Division II of our Argument. First, however, we feel obligated to comment upon the clerk's transcript procedure and the responsibility of appointed counsel to an indigent client and to the court.

The petitioner (Brief, pp. 19, 25-26), characterizes the clerk's transcript appeal as a "white wash" and suggests the system is per se unconstitutional. These observations are, we think, too extreme. The General Assembly or the Iowa Court could enact a provision whereby an appeal would be dismissed on the Court's own motion if the printed abstract was not filed on time. The Rule 15 procedure essentially serves the same function but with the additional factor that the Court reviews the clerk's transcript for plain errors, if any, showing on its face. It is common knowledge in Iowa among lawyers, and this writer knows from personal experiences, that some appeals are

noted solely to permit the convicted defendant time to put his affairs in order. There have also been instances where having been advised as to the lack of merit to an appeal the defendant consented to proceed no further. Moreover, counsel to aid the indigent is appointed by the trial court and where a case comes up on a clerk's transcript the Iowa Court is usually not aware if the appeal involves an indigent. In this respect, where the Iowa Court has received a timely complaint expressing dissatisfaction with a submission on a clerk's transcript it has not hesitated to set aside the submission and allow the appeal to proceed on a printed record and brief; such, it will be recalled, happened here the first time the printed abstract was not filed in time (R. p. 26). And where the Iowa Court has affirmed a conviction on a clerk's transcript it is not impossible to get the Court to vacate the judgment and to allow the indigent plenary review. Compare *State* v. *Davis,* 130 N.W.2d 591 (affirmed on clerk's transcript, October 24, 1964) with *State* v. *Davis,* 140 N.W.2d 925 (Iowa, 1966).

With these considerations in mind, we think it not fair to label the clerk's transcript appeal a "white wash" or to state that the procedure is per se unconstitutional. As we have noted, the real problem with the clerk's transcript system is that it can permit appointed counsel, for whatever reason, to take no significant action in the appeal and to so do without the knowledge or consent of either the indigent appellant or the court. Though we shall presently consider what we believe to be the nature of appointed counsel's obligation to his client and to the court, it is obvious from this Court's decisions that such inaction made possible by the system and culminating in the lack of meaningful review is not permissible, cf. *Lane* v. *Brown,* supra;

Douglas v. *California*, supra; *Ellis* v. *United States*, 356 U.S. 674.[9]

Though such is not necessary to the disposition of this case, we think it appropriate for the State to set forth what it believes to be the responsibility of counsel appointed to assist an indigent on appeal. *Johnson* v. *United States*, 352 U.S. 565, which has been characterized as the federal counterpart of *Douglas* v. *California*, requires the appointment of counsel for an indigent seeking review of a federal conviction. The right having been established, *Ellis* v. *United States*, 356 U.S. 674, holds that the indigent is entitled to representation as an advocate. In that case, the Court concluded that counsel representing the petitioner in the Court of Appeals had performed essentially the role of amici curiae. *Ellis* does not, however, stand for the proposition that, once appointed, counsel must compromise his convictions and carry the appeal to completion even though he justifiably believes the appeal is frivolous. This Court in examining the role of appointed counsel stated (365 U.S. at 675):

> "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may seek to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed."

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9. In some respects, Entsminger was, from an appellate standpoint, less fortunate than the petitioners in *Douglas* v. *California*. Not only was he without the assistance of counsel but he also did not "receive the benefit of expert . . . appraisal of the merits of his case on the basis of the trial record." 372 U.S. 353, 365 (Harlan, J., dissenting). Nor was he, at least on the record before us, advised that the appeal would not be prosecuted because it lacked merit, *Lane* v. *Brown*, 372 U.S. 477, 481-482, note 10.

The United States Court of Appeals for the District of Columbia, pursuant to the *Ellis* decision, has established guidelines for appointed counsel who after making a "conscientious investigation" concludes an appeal is frivolous, *Johnson* v. *United States*, 360 F.2d 844 (C.A.D.C.); *Tate* v. *United States*, 359 F.2d 245 (C.A.D.C.). That Court's instructions, embodied in a Statement dated December 13, 1963, notes that the Court "will be greatly aided if, as a general rule, appointed counsel remains in a case." Recognizing that counsel may justifiably desire to withdraw because of frivolity, the Court conditions such withdrawal on the requirement that he:

> "file a supporting memorandum analyzing the case legally, citing record references to the transcript . . . and also citing any case or cases upon which counsel relied in arriving at his . . . conclusion of [frivolity]" (*Johnson* v. *United States*, at 844-845).

The memorandum is confidential, is not placed in the public files, and is not served on the government, so as to not prejudice the indigent's case if the Court concludes the appeal is not frivolous.

Ellis, Johnson and *Tate* are concerned with federal appeals and it is not clear as to what extent, if any, the principles articulated in those decisions are constitutionally compelled. One thing is clear, however, a convicted indigent desiring an appeal is entitled to the assistance of counsel and this means adequate representation in the role of an *advocate*. Counsel's function on appeal is to point to trial errors, if such there be, and expound the applicable rules of law. In executing this function we think that it

is neither required nor warranted that he advance absurd or legally frivolous contentions.[10]

Thus, in our opinion, if counsel, after conscientious investigation, is convinced that the appeal is frivolous he should be allowed to ask to withdraw, though it should be made plain that as a general rule the appellate court does not favor such requests and would be greatly aided if appointed counsel remains in the case.[11] Prior to any request to withdraw, it seems obvious that counsel should advise the indigent client of the decision as to frivolity and if the client upon being so advised agrees with counsel's decision and desires to proceed no further with the appeal, such desire clearly and expressly communicated to the appellate court should end the problem and result in a dismissal of the appeal.

We cannot, however, agree that the request to withdraw should be conditioned on a requirement that appointed counsel file a memorandum of the kind presently used in the District of Columbia Circuit. The content of such memorandum as described in *Johnson* v. *United States*, supra, is in reality a brief arguing as to how the record shows that the indigent is not entitled to relief, with citations to prove the point. We are skeptical of this procedure because it not only removes appointed counsel from the

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10. Section 610.14 of the 1966 Code of Iowa provides that it is the duty of an attorney ". . . To counsel or maintain no other actions, proceedings, or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense." While we are not certain as to the precise meaning of the proviso to this statute, we are sure that it does not require an appointed appellate attorney to compromise his convictions and press upon the court frivolous arguments.

11. Judge Burger's concurring opinion in *Johnson* v. *United States*, supra, presents a highly cogent thesis as to how court appointed counsel can perform an important function to his client and to the court as an advocate in the appeal even though he believes his "client's cause . . . is well nigh hopeless," 360 F.2d at 846-847.

role of an advocate but it also, at the very least, casts him in the role of amici curiae, and some would say it makes him *adverse* to his client, *Cruz* v. *Patterson*, 253 F. Supp. 805, 808 (D. Colo.), affirmed 363 F.2d 879 (C.A. 10); cf. *Douglas* v. *California*, 372 U.S. 353, 358.

We think that if counsel, after conscientiously reviewing the trial transcript, concludes that the appeal is so lacking in merit that he cannot justly associate himself with it and if he informs his client of this decision, then all that should ethically be required is that he advise the trial court, not the appellate court, that since his appointment by that court his relationship with respect to the appeal has developed to the point that he can no longer in good faith act in the best interest of his client. Should the court press counsel for further elaboration the most that should be required is that counsel state that he has thoroughly examined the trial transcript; that in his professional opinion the defendant has no meritorious appeal; and that he cannot in good conscience continue as an advocate. It is contemplated that a court will rarely compel any lawyer, by judicial order, to act contrary to conscience, *Johnson* v. *United States*, 360 F.2d at 847, but should the court refuse permission to withdraw counsel should file a printed record and a brief informing the appellate court of the points his client urges and otherwise see that the case is reviewed in accordance with "a set of rules which have evolved from centuries of experience and which are still being changed," *Johnson* v. *United States*, supra at 847.

Where counsel is permitted to withdraw, such results because of the nature of his ethical obligation relative to an appeal and that aspect of the problem must be separated from the indigent defendant's right to plenary review of his conviction. In this respect, a majority of this

Court is committed to the proposition that according plenary review contemplates the assistance of counsel and, accordingly, if the indigent desires to proceed with the appeal further counsel should be secured by the trial court to assist him.[12]

It should be of interest to the Court that the Attorney General has drafted proposed rule changes which would do away with the clerk's transcript appeal and spell out the role of counsel appointed to assist an indigent seeking review of a conviction. We have petitioned the Iowa Supreme Court to adopt the proposed rules and the Court has assured us that it will carefully consider the same. A copy of the petition and a copy of the proposed rules are set forth in our appendix, infra, pp. A2-A6.

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12. Respecting the observation as to a second appointment of counsel, some will immediately cry "Pandora's box." Though we doubt that such apprehension is relevant to any endeavor to delineate the obligation of a court appointed attorney, we think the fear is groundless. With the rich and poor alike there will come a time that the failure to secure an attorney to champion a frivolous appeal will be grounds enough for the appellate court to dispose of the matter on the trial transcript and any briefs that may be filed pro se. Such would not deny the rich due process nor would it work an invidious discrimination against the poor, because the State will have done all that could reasonably be required of it. Moreover, we do not think it is necessary to attempt to isolate when that time will have arrived. There will be very few appeals that are so patently frivolous that appointed counsel will refuse to associate himself with the same and of that number the chances of further counsel desiring to withdraw is probably negligible.

II.

Where the Appellate Process Has Been Constitutionally Defective, As for Example Where the Defendant Has Been Deprived of Adequate Appellate Review, the Relief to Which the Defendant-Appellant Is Entitled Is an Appeal Free of the Constitutional Defect. In This Respect, the Supreme Court of the United States Should Not, Even Though It Has the Trial Record Before It, Reach the Merits of the Proceedings Leading to the Defendant's Conviction.

Though the trial transcript was not before the Iowa Court when it affirmed Entsminger's conviction on the clerk's transcript, counsel appointed by this Court has lodged the same with the Court, designating it as Exhibit "A". Predicated on the content of that transcript, the petitioner argues, Brief, Division III, that he was denied due process of law during the proceedings culminating in the conviction, in that personal papers were seized from his person, without consent, and the same were used at the trial for handwriting comparison purposes, all in violation of his right to privacy and of his privilege to be free from compulsory self-incrimination. In this respect, the Court is asked to immediately reach the merits of the Fourth and Fifth Amendment argument and to reverse the conviction and remand for a new trial, even though the Iowa Court has not, in fact, passed on the same.

Apart from the fact that the trial transcript was not of record below and, thus, not of record here, there is yet another reason why the relief prayed for is not appropriate. Where the appellate process has been constitutionally defective, as for example where a defendant has been deprived adequate appellate review, the decisions of this Court clearly indicate that the relief to which such an appellant is entitled is an appeal free of the constitutional defect. *Douglas* v. *California,* is the first case in point.

Having been convicted in the trial court, petitioners Douglas and Meyers appealed as of right to the California District Court of Appeals. That court denied their request for appointment of counsel after "having gone through the *record*" (Emphasis added), and affirmed the convictions (372 U.S. at 354-355). A majority of the Court held that an indigent has been deprived of a constitutional right "where the merits of the one and only appeal [he] has as of right are decided without benefit of counsel" (372 U.S. at 357). In light of this holding, the judgment of the District Court of Appeals was vacated and the case remanded "*to that court* for proceedings not inconsistent with this opinion" (372 U.S. at 358, Emphasis added). The trial transcript was a part of the record before the Court in *Douglas* and the petitioners seemingly asked the Court to review their complaints relative to an alleged denial of fair trial (372 U.S. at 367, note 4). The Court did not reach the merits of the conviction and its mandate to the intermediate appellate court clearly contemplated only an appeal on the merits with counsel to assist the petitioners. The major difference between *Douglas* and the instant case is that the California appellate court had the trial record before it, had "gone through" such record, and affirmed the convictions on the basis of that record. The Iowa Court did not have the trial record, a factor that makes this case an even more inappropriate vehicle with respect to the petitioner's request that the Court immediately reach the merits of his conviction.

With respect to other state cases having some relevance to our contention that the Court should not now reach the merits of the petitioner's Fourth and Fifth Amendment contentions, see *Cochran* v. *Kansas*, 316 U.S. 255 (trial record before the Court); *Dowd* v. *Cook*, 340 U.S. 206; *Draper* v. *Washington*, 372 U.S. 487.

Coppedge v. *United States*, 369 U.S. 438, though a federal case, is very much in point. Coppedge, having been convicted in the District of Columbia, sought leave of the trial court to appeal in forma pauperis and such request was denied. An application for leave to so appeal was then filed with the Court of Appeals; counsel was appointed to assist the petitioner; a transcript of the trial was prepared at government expense; and counsel filed a 30 page memorandum in support of the petition for leave to appeal. The Court of Appeals denied leave to appeal in forma pauperis. This Court, noting at some length the delay that had occurred between the petitioner's original conviction and his attempt to obtain appellate review, stated as follows (369 U.S. at 452-453):

> "In the light of this delay, it is not surprising that petitioner asks us to reach the merits of his case immediately. However, delay alone, unfortunate though it is, is not sufficient cause to bypass the orderly processes of judicial review. Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court."

Apart from these decisions, it should be noted that in asking the Court to reach the merits of his conviction the petitioner has taken considerable liberty with the trial transcript in an endeavor to show that he was subjected to an illegal search and seizure and compelled to incriminate himself. Without conceding that the transcript is of record before this Court, as we read our copy it is by no means clear that he didn't consent to the use of the papers in issue or that he raised timely and appropriate objections on Fourth and Fifth Amendment grounds (Exhibit

"A", pp. 48-49, 112-113). Indeed, that record is void of any objection relative to compulsory self-incrimination, cf. *Henry* v. *Mississippi*, 379 U.S. 443; *Schmerber* v. *California*, 16 L. Ed. 2d 908, 916, note 9. These are issues showing on the face of the trial transcript and are of such a nature that this Court should not be asked to pass on them in the first instance.

The Iowa Supreme Court has recently ruled that it has jurisdiction to entertain a delayed appeal where there has been a "denial of a constitutional right in the appellate process," *Ford* v. *State*, 138 N.W.2d 116, 119 (Iowa, 1965). We have conceded that the petitioner sought but did not obtain meaningful review of his conviction because of inaction of court appointed counsel. Accordingly, we think the relief to which he is entitled is to have the case remanded to the Iowa Supreme Court for further proceedings not inconsistent with the Court's decision.

III.

Assuming It Is Proper for the Court to Reach the Petitioner's Fourth and Fifth Amendment Issues, the Trial Record and the Case Law with Respect Thereto Reflects Numerous Reasons As to Why the Petitioner's Search and Seizure and Self-Incrimination Contentions Are Without Merit.

While we do not believe the Court should reach the search and seizure and self-incrimination issues, we shall, out of an abundance of caution, consider the same. We accept the petitioner's assertion (brief p. 39) that at the time of his arrest his belongings, among which were papers written by him, were "taken away . . . and placed for safekeeping purposes in a safe." The search and seizure and self-incrimination issues will be separately considered.

Search and Seizure

Carroll Dawson, a Des Moines, Iowa police lieutenant with expertise in handwriting examination, identified several state exhibits as papers which were in the petitioner's possession when he was being booked on the forgery charge (Exhibit "A", pp. 44-48). Lt. Lawson testified that he removed certain of these papers at that time (Exhibit "A", p. 44), and in answer to a question on direct as to who wrote them the following colloquy transpired (Exhibit "A", pp. 48-49):

"Q. Did you have a conversation with Mr. Entsminger on that date?

"A. Yes, sir, I did.

"Q. Will you tell us what the conversation consisted of?

* *

"A. Mr. Entsminger had these papers on him when he was being booked in the jail that day, and I looked at them and asked Mr. Entsminger if he had written these himself.

"Q. What did he say?

"A. I asked him twice, in fact, because I wanted to know for sure that he had written them himself in long hand, and his answer was that he had written them.

"Q. State whether or not you had any further conversation about taking them from him at that time.

"A. Well, Mr. Entsminger refused to give us a sample of his writing, the usual sample we take in check cases, and consequently that is why I was interested in these. And when I told him that the County Attorney advised that we could hold these for evidence he said that would be all right, he would write some more the next day."

There was no objection to the above identification of the petitioner's papers; nor any objection on Fourth Amendment grounds to the above testimony. In this respect, the petitioner did not move to suppress the evidence before trial and at no time during the trial did he request a hearing on the issue as to whether the papers and testimony relative thereto were inadmissible under the Fourth and Fourteenth Amendments. The issue was not raised in the motion for a directed verdict at the close of the state's case (Exhibit "A", p. 107), and all that was stated in the motion when renewed at the close of the trial was "that the evidence was illegally obtained," with no attempt to identify what evidence was being referred to (Exhibit "A", p. 124). In fact, these papers and a volume of evidence relating thereto was introduced and only at one point did trial counsel proffer a very feeble and unarticulate objection that there had "been no showing that this evidence was legally obtained" (Exhibit "A", p. 49).

Assuming for a moment that there was a search and seizure in the constitutional sense, we think there are at least two reasons why the petitioner is in no position to complain of the same.

In the first place, one can freely consent to a search of his person and, having done so, any search or taking of evidence pursuant to his consent is not unlawful and his constitutional rights are not violated, *State* v. *Post*, 255 Iowa 573, 582, 123 N.W.2d 11; cf. *Stoner* v. *California*, 376 U.S. 483. The trial transcript in the instant case reflects testimony that the petitioner was informed that the papers were wanted for evidence and "he said that would be all right, he would write some more the next day" (Exhibit "A" pp. 48-49). The petitioner subsequently denied that he gave anyone permission to take his papers, but he in no way stated or inferred that he was coerced or tricked into giving

them up. The trial record shows sufficient creditable evidence of petitioner's consent to the taking of his papers.

In the second place, in Iowa, as in other jurisdictions, it is incumbent upon the defendant to demonstrate that evidence has been illegally procured by a motion to suppress the evidence and the right to have the evidence suppressed can be waived where the trial court is not timely made aware of the constitutional objection, *State* v. *Shephard*, 255 Iowa 1218, 1222, 124 N.W.2d 172; *State* v *Dwinnells*, 146 N.W.2d 231, 234 (Iowa, 1966). In the instant case there was no motion to suppress filed prior to the trial and at no time during the trial did the defendant request a hearing or clearly let the trial court know that he felt the evidence inadmissible because of an illegal search or seizure. We think that predicated on the trial record he should not now be allowed to raise the search and seizure issue, cf. *Schmerber* v. *California*, 16 L. Ed. 2d 908, 916, note 9; but see *Henry* v. *Mississippi*, 379 U.S. 443.

Apart from any issue as to consent or waiver, there was no search and seizure in the constitutional sense and it was constitutionally permissible to use the papers for evidential handwriting purposes. Where one has been arrested for the commission of a public offense in Polk County, Iowa, upon booking the accused it is customary practice to inventory his personal effects and to retain the same in a custody locker for safekeeping. The inventorying policy is justifiably required for the safety of the prisoner and of law enforcement officers and by the need for efficient operation and administration of a jail. In this respect, the petitioner does not contend that the inventorying practice is constitutionally impermissible; his position is that things taken as the result of an inventory may not subsequently be used against the accused in connection with a criminal trial growing out of the charge for which he was

arrested. The judicial decisions and sound reasoning relative to this issue hold against the petitioner's contention. *Lanza* v. *New York*, 370 U.S. 139; *Ker* v. *California*, 374 U.S. 23; *Burge* v. *United States*, 342 F.2d 408 (C.A. 9); *State* v. *Stevens*, 26 Wis. 2d 451, 132 N.W.2d 502; *State* v. *Polton*, 143 N.W.2d 307 (Iowa, 1966); cf. *State* v. *Chinn*, 231 Or. 259, 373 P.2d 392.

Ker v. *California*, the facts of which we do not think it necessary to detail, is cited for the proposition that where police officers are acting within lawful authority and during the course of such activity are permitted to see that which was placed before them in full view, the discovery of such *does not constitute a search* and the thing so discovered can subsequently be used for evidential purposes (374 U.S. at 42-43). *Lanza* v. *New York*, teaches that prison administrative rule can to some extent interfere with one's right of privacy (370 U.S. at 143):

> "[T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument."

And where an automobile has been impounded under statutory authorization upon probable cause to believe it to have been used in the sale and possession of narcotics, *Burge* v. *United States*, supra, rules that from the time of its seizure the accused lost the right to privacy thereto and could not complain as to the use in evidence of things subsequently found therein (372 F.2d at 414).

While these cases present a frame of reference from which one can get a glimpse of the principle we contend for, *State* v. *Stevens*, supra, places the problem in its proper perspective and we think its sound reasoning goes far to

dispose of the petitioner's search and seizure contention. Mary Perez Stevens was arrested in Kenosha for disorderly conduct, booked at the jail, and her property was removed prior to being placed in a cell. A peace officer made an inventory of her purse and the examination revealed material in the bottom of the same, the discovery of which resulted in a prosecution for theft through fraud. On appeal Miss Stevens contended that the use of material taken from her purse amounted to an illegal search and seizure. The Supreme Court of Wisconsin held to the contrary (132 N.W.2d at 506-507):

> "... We agree with the defendant this search was not incidental to the arrest but it does not follow the seizure of the contents of the purse was illegal.
>
> * * *
>
> "The examination of the defendant's purse at the police station was apparently made in accordance with a custom to inventory the personal effects kept for safekeeping by the police for one lawfully held in jail. Such an examination and inventorying of personal effects of a prisoner at the police station and not at the scene of arrest, and at some time remote from the arrest can hardly be justified under the traditional concept of being incidental to the arrest. In this case the legality of the seizure of the contents of the purse rests upon a custody search required for the safety of the prisoner and of law enforcement officers and by the efficient operation and administration of a jail.
>
> * * *
>
> "On almost identical facts, it was held seizure some days after the arrest of property of an accused kept by the police for one in jail was valid on the ground of being incidental to the arrest. Baskerville v. United States, (C.A. 10th, 1955) 227 F.2d 454. For greater reason, in custody examinations the material

or objects which are not looked for but are on the person must be held to be validly seized in the process of incarcerating or jailing the defendant. Such type of search is referred to in Charles v. United States, (C.A. 9th, 1960) 278 F.2d 386, 389, footnote 2. See also Varon, Searches, Seizures and Immunities, Vol. 1, p. 196 (1961), in which the author states that any incriminating evidence obtained by the police in a custody search may be validly seized and used as evidence against the accused either upon the charge for which the arrest was made or upon an additional charge occasioned by the evidence. See also 51 A.L.R. 431; 32 A.L.R. 685.

"Since the purse and other personal articles of the defendant were properly in the custody of the police for safekeeping, the police could seize what was in plain sight."

Though we believe what has been said above disposes of the petitioner's search and seizure contention, one further observation is in order. The petitioner in his brief (pp. 40-46) has felt it necessary to try to harmonize this Court's pronouncements on the so-called "mere evidence rule". Compare *Boyd* v. *United States*, 116 U.S. 616 with *Gouled* v. *United States*, 255 U.S. 298; and *Abel* v. *United States*, 362 U.S. 217. We feel no such compulsion to join in the task, because whatever the vitality of the mere evidence rule in the federal realm, that rule is not constitutionally binding on the states, cf. *Schmerber* v. *California*, 16 L. Ed. 908; Comment, 52 Iowa Law Review 344, 347-348. The taking of the blood sample in *Schmerber* and the testimony relative thereto can only be classified conceptually as mere evidence; not contraband, nor the instrumentality used to commit a crime or the fruits thereof.

It is, moreover, worth noting that several of the states, including Iowa, have, in well reasoned opinions, declined to follow the "mere evidence rule." *People* v. *Thayer*,

63 Cal. 2d 635, 408 P.2d 108 (opinion by Traynor, J.); *State* v. *Bisaccia*, 45 N.J. 504, 213 A.2d 185; *State* v. *Raymond*, 142 N.W.2d 444 (Iowa, 1966).

Compulsory Self-Incrimination

The petitioner also complains that in using the papers in issue the State compelled him to be a witness against himself. Since, as we have shown above, the papers lawfully came into the State's possession and the same could properly be used at the trial, the self-incrimination argument is, at the same time, both specious and spurious. Moreover, the trial record is void of any objection to the use of the papers by reasons of the Fifth Amendment and the contention is now precluded by *Schmerber* v. *California*, 16 L. Ed. 2d 908, 916, note 9. In keeping with the footnote referred to, the trial in this case was commenced on October 2, 1964, several months after this Court's ruling in *Malloy* v. *Hogan*, 378 U.S. 1.

Even if we assume that our argument as to the petitioner's search and seizure contention is not sound, the use of the papers did not compel the petitioner to be a witness against himself, *Schmerber* v. *California*, supra; *People* v. *Harper*, 115 Cal. App. 2d 776, 252 P.2d 950. Schmerber's blood had been withdrawn despite his refusal to freely give a sample, on the advice of counsel. Evidence relative to the alcoholic content of his blood at the time of his arrest was introduced at the trial over his due process objection based, in part, on the self-incrimination clause of the Fifth Amendment. In holding that the withdrawal of blood did not, under the circumstances of that case, amount to compulsory self-incrimination the Court stated (16 L. Ed. 2d at 916):

"It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, *to write or speak for identification*, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (Emphasis added).

The petitioner draws on the language referring to *Boyd* v. *United States*, in the quote as establishing his point. In so doing he ignores the language we have italicized. If one can be made to "write . . . for identification" purposes we can fail to see any distinction between such compulsion and compelling one to give up something he has already written for identification purposes. Either case falls within the "real or physical evidence" category and does not violate the rule against self-incrimination.

In conjunction with our belief that we are not herein dealing with eliciting testimonial responses, may we call attention to McCormick on Evidence, Section 126, pages 263-65 (1954), wherein the author takes note of the view that the privilege protects only testimonial compulsion in the sense of giving testimony and of producing documents and other objects in court; and that in jurisdictions following this view the privilage is not violated when the accused is, inter alia, required to give a specimen of his

handwriting. The author observes, ". . . This view most nearly achieves the aim of holding the privilege within limits which will enable law enforcement officers to perform their tasks without unreasonable obstruction." Id. p. 265.

We submit that the following language in *People* v. *Harper*, 115 Cal. App. 2d 776, 779, 252 P.2d 950, 952, presents a persuasive rationale for viewing handwriting exemplars as outside the privilege against self-incrimination:

> ". . . Defendants rely upon the privilege against self-incrimination contained in the Constitution of California (art. I, §13) and in the Fifth Amendment to the Constitution of the United States. Defendants, however, do not come within the protection of those constitutional guaranties since they only protect a person from any unwilling testimonial disclosures, and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an examplar of his handwriting. The protection extends only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. There was no 'testimonial compulsion' here. Defendants were not required to verify the authenticity of their handwriting on the exemplars. This was provided by a witness who saw them fill out the exemplars. Defendants were not compelled to disclose that the writing on the betting markers was theirs. This was proved by a handwriting expert. There is here no reliance to be placed upon any statement made by either of the defendants. The evidence was their handwriting, a physical fact which was compared with the handwriting on the betting markers and found to be the same. . . ."

CONCLUSION

For all of the above reasons the State respectfully concedes that the petitioner is entitled to meaningful appeal with effective assistance of counsel and that the case should be remanded to the Iowa Court with directions to that end. In the event the Court finds it appropriate to immediately reach the petitioner's Fourth and Fifth Amendment contentions, the Court is requested to rule against the petitioner on the merits and enter judgment affirming the conviction.

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Des Moines, Iowa
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December, 1966

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APPENDIX A

(Statutory Provisions and Procedural Rules)

Section 793.17 of the 1962 Code of Iowa, relative to criminal appellate procedure, provided:

> "The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases."

Supreme Court Rules 15 and 16, 1962 Code of Iowa, Vol. 2, pp. 2715-2716, provided:

> "Court Rule 15. When an appeal is taken in a criminal case and the clerk's transcript of the record, required by section 793.6 of the Code, is filed with the clerk of this court, the cause shall be assigned for submission on such transcript, but the date set for such submission shall be not less than ninety days after the date the appeal was perfected as shown by such transcript.
>
> "Court Rule 16. If a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall serve on the attorney general and file with the clerk of this court a notice to that effect, before the day set for the submission of the cause under the provisions of Rule 15. In that event, the appellant shall file the printed abstract of the record with the clerk of this court and serve a copy upon the attorney general within ninety days following the service and filing of the notice of appeal, unless, within such ninety days, additional time be granted by a judge of this court

after notice and an opportunity to be heard have been given to the attorney general, and the cause shall be reassigned for submission on a date at least ninety days subsequent to the filing of the printed abstract of the record. Appellant shall serve his brief and argument on the attorney general and file it with the clerk of this court within forty-five days after filing the abstract. The state shall have thirty days after the filing of appellant's brief within which to deny the abstract, serve and file amendment thereto and brief and argument. Appellant shall serve and file his reply brief within fifteen days after the state's brief is filed. A denial by the appellant of the state's additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record."

APPENDIX B

TO: THE SUPREME COURT OF IOWA

FROM: THE ATTORNEY GENERAL OF IOWA

RE: PROPOSED RULE CHANGES

In recent years the United States Supreme Court has ruled in a number of cases that convicted indigent defendants desiring appellate review of criminal judgments are entitled to adequate and effective review despite poverty. Many of these cases have made it clear that such review can only be obtained by furnishing the appellate court with a transcript of the trial proceedings or its equivalent and six members of the High Court have held that a state must furnish an indigent with counsel to assist with the appeal. This Court has recently stated that to "afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necesary briefs is required," *Weaver* v. *Herrick* 140 N.W. 2d 178, 181 (Iowa, 1966).

The Iowa provisions relative to criminal appellate procedure are such that in the usual case the requirements of *Weaver* v. *Herrick* are satisfied. We are, however, familiar with some cases where an indigent defendant desired plenary review of his conviction but counsel appointed to assist him, without either the knowledge or the consent of the indigent or this Court, failed to file a printed record and a brief with the result that the conviction was affirmed on the clerk's transcript. The clerk's transcript appeal is not meaningful review of the proceedings culminating in the conviction within the meaning of *Weaver* v. *Herrick* or the many United States Supreme Court decisions on the subject.

There are, of course, some convicted defendants who have resorted to a clerk's transcript appeal to obtain time to place their affairs in order; others have desired a full appeal, believed they were receiving the same, but obtained review only on a clerk's transcript. As to this latter class there is a very serious argument that they have been deprived of their constitutional right to have full and effective appellate review. Accordingly, we are submitting two proposed rule changes which we believe would remedy this problem. We respectfully request the Court to give consideration to these proposed changes.

Lawrence F. Scalise
Attorney General
Des Moines, Iowa
By /s/ Don R. Bennett
Don R. Bennett
Assistant Attorney General

Proposed Rule 15

If a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall serve on the attorney general and file with the clerk of this court a notice to that effect within thirty days following the service and filing of the notice of appeal. In that event, the appellant shall file the printed abstract of the record with the clerk of this court and serve a copy upon the attorney general within ninety days following the service and filing of the notice of appeal, unless, within such ninety days, additional time be granted by a judge of this court after notice and an opportunity to be heard have been given to the attorney general, and the cause shall be reassigned for submission on a date at least ninety days subsequent to the filing of the printed abstract of the record. Appellant shall serve his brief and argument on the attorney general and file it with the clerk of this court within forty-five days after filing the abstract. The state shall have thirty days after the filing of appellant's brief within which to deny the abstract, serve and file amendment thereto and brief and argument. Appellant shall serve and file his reply brief within fifteen days after the state's brief is filed. A denial by the appellant of the state's additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record.

If the printed abstract is not filed within ninety days following the service and filing of the notice of appeal, or within any period of additional time granted in the manner described above, the Court shall on its own motion dismiss the appeal with prejudice. Counsel appointed to represent an indigent defendant should take note of Supreme Court Rule 16 and abide by the provisions set forth therein.

Proposed Rule 16

Section 610.11 of the Code provides that upon being admitted to the bar an attorney shall take an oath or affirmation to faithfully discharge the duties of an attorney and counselor to the best of his ability. In keeping with such oath, an attorney appointed to represent a convicted indigent desiring an appeal is expected to satisfy the requirements of Supreme Court Rule 15 relative to the filing of a printed abstract and brief and argument. Under no circumstances should court appointed counsel, without the knowledge or consent of the defendant, fail to file the necessary record and brief and argument.

Where counsel has been appointed to represent an indigent defendant desiring an appeal, the Court would be greatly aided if appointed counsel remains in the case and it does not favor a request to withdraw from the appeal. If, however, counsel is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal he may seek leave from the appropriate trial court to withdraw. Prior to any request to withdraw from an appeal, appointed counsel should advise his client of the decision as to frivolity. If upon being so advised the defendant agrees with counsel's decision and desires to proceed no further with the appeal, such desire clearly and expressly communicated to this Court in writing shall result in the appeal being dismissed.

In the event the defendant desires to proceed with the appeal, appointed counsel may make application to the appropriate trial court to be permitted to withdraw from the case. If the trial court refuses to honor such request, counsel should file a printed record and a brief informing

the Court of the points his client urges and otherwise see that the case is reviewed in accordance with the rules relative to criminal appeals. Where counsel is permitted to withdraw and the defendant desires to proceed with the appeal, upon the request of the convicted indigent further counsel should be secured by the trial court to assist with the appeal.

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SUPREME COURT OF THE UNITED STATES

No. 252.—October Term, 1966.

Harvey Lyle Entsminger, Petitioner, v. State of Iowa. } On Writ of Certiorari to the Supreme Court of Iowa.

[May 8, 1967.]

Mr. Justice Clark delivered the opinion of the Court.

This case, which was argued with *Anders* v. *California*, — U. S. —, decided today, presents a similar problem in that we are here also concerned with the constitutional requirements which are binding on a State in the administration of its appellate criminal procedures with respect to convicted indigents seeking initial review of their convictions. Petitioner, who was represented at trial by a court-appointed attorney, was convicted of uttering a forged instrument in violation of Iowa law. Shortly after the verdict was rendered, he requested the trial court to appoint different counsel to aid him in the preparation of a motion for new trial. Counsel was appointed, the motion was prepared and filed but the trial court overruled it. Upon petitioner's application, the same attorney was appointed to represent him on appeal; counsel then prepared and filed a timely notice of appeal.

Iowa law provides alternate methods of appealing criminal convictions, the first method being an appeal on a "clerk's transcript" which follows the notice of appeal as a matter of course.[1] Under this procedure, the clerk of the trial court prepares and files a modified transcript of the proceedings below; such transcript contains only the Information or Indictment, the Grand Jury

[1] Iowa Code § 793.6 (1962 ed.).

Minutes, the Bailiff's Oath, Statement and Instructions, various orders and judgment entries of the court, but does not contain the transcript of evidence nor the briefs and argument of counsel. This practice is used in the absence of a request on the part of counsel for a plenary review of the case. If such a request is made, the appellant is provided an appeal on a complete record of the trial, including not only those items included in the clerk's transcript, but in addition thereto, the briefs and argument of counsel.[2]

Petitioner asked his appointed attorney to perfect a plenary appeal and counsel gave notice therefor which, though belatedly filed, was allowed by the Iowa Supreme Court. However, counsel, apparently believing that the appeal was without merit, failed to file the entire record of petitioner's trial although it had been prepared by the State and counsel had advised petitioner that he would file same. It is of note that counsel never moved the court for leave to withdraw from the case. Despite the fact that the Supreme Court had ordered the case submitted on the full record, briefs and argument of counsel—and the record here fails to reveal any recission of that order—the court took petitioner's case into consideration on the clerk's transcript alone as it was required to do under Iowa law.[3] The conviction was affirmed by the Supreme Court of Iowa, *State* v. *Entsminger*, 137 N. W. 2d 381 (1965). This was done despite the request of the petitioner a few days before the affirmance of his conviction, that the court issue an order commanding the trial court to "transmit the certified records" to the Supreme Court for its review. We granted certiorari, ___ U. S. ___.

[2] Rules of the Supreme Court, Rule 16, Iowa Code, Vol. II, p. 2716 (1962 ed.).

[3] *Id.*, Rule 15.

The Attorney General of Iowa in the utmost candor and with most commendable fairness concedes that petitioner has not received "adequate appellate review" and is entitled to an appeal free of constitutional doubt. We have examined the record carefully and agree that the clerk's transcript procedure as applied here "can hardly be labeled adequate and effective review of the merits of the proceedings culminating in the conviction."[4] He bases his conclusions in this regard upon the holding of the Iowa Supreme Court in *Weaver* v. *Herrick*, 140 N. W. 2d 178 (1966), where the court specifically stated:

> "To afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necessary briefs is required." At 181.

As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal, *Douglas* v. *California*, 372 U. S. 353 (1963), and that appointed counsel must function in the active role of an advocate, as opposed to that of *amicus curiae*, *Ellis* v. *United States*, 356 U. S. 674 (1958). In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the Court held that a State that provides transcripts on appeal only to those who could afford them was constitutionally required to provide a "means of affording adequate and effective appellate review to indigent defendants." At 20. Again in *Burns* v. *Ohio*, 360 U. S. 252 (1959), the Court, in reaffirming the *Griffin* rule, held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access

[4] Indeed the Attorney General has moved the Supreme Court of Iowa to change its rule with respect to the clerk's transcript system and his suggested changes and the responsibility of appointed counsel thereunder are now under advisement. We do not pass on the validity of the suggested procedure.

to any phase of that procedure because of their poverty." At 257. In *Smith* v. *Bennett*, 365 U. S. 708 (1961), the Court, once again considering the question, held that such principles are not limited to direct appeals but are also applicable to post conviction proceedings. In that case the Court held that "the Fourteenth Amendment weighs the interests of the rich and poor criminals in equal scale, and its hand extends as far to each." At 714. Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure as embodied in Iowa law. Such procedure automatically deprived him of a full record, briefs, and arguments on the bare election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record in the case. By such action "all hope of any [adequate and effective] appeal at all," *Lane* v. *Brown*, 372 U. S. 477, 485 (1963), was taken from the petitioner.

Since petitioner admittedly has not received the benefit of a first appeal with a full printed abstract of the record, briefs, and oral argument, as was his right under Iowa law, we do not reach the merits of his conviction here. We have discussed at some length the responsibility of both the appellate court and appointed counsel representing indigents on appeal in *Anders* v. *California*, *supra*, decided this day, and we need not repeat such here. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK and MR. JUSTICE HARLAN join, concurs in the judgment and in the Court's opinion, except as it refers to *Anders* v. *California*, *supra*, a case which he thinks involves quite different issues.